Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-901

MR. ANDREW WOODS, *Petitioner,*

v.

SAFEWAY STORES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT B. FITZPATRICK
LANA KAY JONES

FITZPATRICK & JONES
1707 N Street, N.W., Suite 300
Washington, D.C. 20036
(202) 737-3334

Attorneys for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

MR. ANDREW WOODS, *Petitioner*,

v.

SAFEWAY STORES, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Mr. Andrew Woods, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this action on July 24, 1978, as to which rehearing was denied on September 6, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, reported at 579 F.2d 43, affirming the judgment of the District Court is printed as Appendix A. The Order of the Court of Appeals denying rehearing is printed as Appendix B. The opinion of the United States District Court for the Eastern District of Virginia, reported at 420 F.Supp. 35, is printed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 24, 1978 (Appendix A). Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 6, 1978 (Appendix B).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court below, in affirming the judgment of the District Court, erred when it upheld the respondent's racially discriminatory treatment of petitioner without a showing that the treatment was justified on grounds of "business necessity".

2. Whether the court below should have required a compelling justification for petitioner's discharge rather than accepting respondent's articulation of a "business purpose" as a sufficient defense.

3. Whether respondent sustained its burden by articulating a "business purpose" and by showing that petitioner was the only black employee discharged on account of a physical characteristic peculiar to his race.

4. Whether the court below should have found that a less discriminatory alternative existed.

STATUTE INVOLVED

The statutory provision involved is Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1), which provides as follows:

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . ."

STATEMENT OF THE CASE

This case raises significant questions as to the meaning and enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-*et seq.* Petitioner contends that the respondent-employer, the Nation's largest chain of retail grocery stores, discriminated against him in violation of Section 703 of said Act, 42 U.S.C. § 2000e-2, when it discharged him solely on the ground of a racially-based physical characteristic without establishing a "business necessity" for such action.

Petitioner, a young black man, has a severe skin disorder called *pseudofolliculitis barbae. Pseudofolliculitis barbae* is caused by the tips of kinky Negroid facial hairs penetrating the skin surface and causing an inflammatory reaction. This reaction ranges from a few "razor bumps" to multiple papules and pustules, which can be very painful. For many victims, shaving increases the pain. Expert testimony at trial established that this disorder is peculiar to and is a racial characteristic of Negroid people.

Unless the disorder is properly treated, permanent disfigurement can result. In a severe case of *pseudofolliculitis barbae*, the only remedy may be temporary cessation of shaving until an individual treatment plan

can be devised by a dermatologist, as regular shaving can exacerbate the disorder. And in some severe cases, dermatologists' only known cure is indefinite abstinence from shaving. This case arose out of respondent's refusal to modify its grooming code to permit petitioner to wear a neatly-trimmed beard and its subsequent discharge of petitioner.

Petitioner was employed by respondent as a store clerk in the Hampton-Newport News area of Virginia. Prior to accepting employment with respondent, petitioner was employed as a store clerk at respondent's principal local competitor directly across the street from respondent's store. Only after petitioner had accepted respondent's job offer and resigned from respondent's competitor did respondent's store manager inform him that he was required to be clean shaven.[1] For several months the petitioner endeavored to comply with this code by shaving regularly. However, shaving exacerbated his condition and it became so severe that his dermatologist, a consultant to the United States Army, advised him to abstain from shaving indefinitely.

When petitioner's dermatologist first advised repondent of petitioner's condition and of his medical advice, respondent allowed petitioner to continue working without shaving. During this period, petitioner trimmed his beard regularly and continued to perform his duties in a diligent and capable manner.[2] None of respond-

[1] Respondent's grooming code is set forth in its entirety in Appendix C at p. 5a, n. 2.

[2] As a store clerk, petitioner's principal duties were to stock shelves, primarily with canned goods and paper products. A substantial portion of his duties were performed after the store had been closed for the day.

ent's customers ever complained about petitioner's appearance nor were his co-workers inconvenienced thereby.

After respondent had exempted petitioner from its grooming code for nearly six months, it discharged him for his continued inability to comply with its code. Thereafter, this action was initiated as an individual action seeking to establish that respondent's treatment of petitioner violated Title VII of the Civil Rights Act of 1964, as amended.

At trial, respondent attempted to justify its treatment of petitioner on the ground that the purposes of its grooming code were legitimate and petitioner was the only black discharged because of his inability to comply with the rule. Respondent presented testimony at trial that the purposes of its code were to provide clear guidance to its employees regarding its grooming standards and to restrict employment to those individuals who would "be objectionable to the least number of people in the community". Respondent also testified that petitioner was the only employee with such a severe case of *pseudofolliculitis barbae* that he could not comply with respondent's grooming code.

Petitioner, on the other hand, established that respondent permitted its store employees to wear other facial adornments such as mustaches, long sideburns, and Afros, and "to wear their hair at any length they prefer so long as it is kept clean and neat", even though these were not worn out of medical necessity; that no complaint was ever made by a customer about petitioner's appearance during the nearly six months that he continued to be employed by respondent while wearing a beard; that his beard presented no health hazard;

that at the time of trial the manager of the store at which petitioner had been employed was allowing a black employee to violate the rule without any showing of medical necessity; that respondent allowed other employees in a public contact job to grow beards; that a number of respondent's competitors in the Hampton-Newport News area allowed their store employees to wear beards; that respondent allowed its store employees in several other areas of the country to grow beards; and that the United States Army, Air Force and Marines allow servicemen with severe *pseudofolliculitis barbae* to grow short, well-trimmed beards prescribed by military dermatologists.[3]

The District Court found that respondent acted "to disqualify an otherwise qualified black from employment solely on the basis of a genetic characteristic peculiar to his race" (App. 16a). Despite this finding, however, it held that respondent had not violated Title VII "because the rule is justified by a legitimate business purpose" (App. 16a); it has "a relation to existing human preference scales" (App. 18a); and "the degree of impact of the employment practice in question is slight" (App. 18a). In short, the District Court decided that "a business purpose exists to support" respondent's rule and "the rationale behind the rule overrides the slight racial impact resulting therefrom" (App. 19a).

[3] In express recognition of this disorder, the rules of the United States Army allow servicemen with *pseudofolliculitis barbae* to grow a temporary and, in some cases, a permanent beard. TB MED 287, Department of the Army Technical Bulletin, "Pseudofolliculitis of the Beard," August 15, 1973.

The Air Force's policy as of September 21, 1973 permitted a well-trimmed beard of one-fourth inch in length where medically prescribed. AFM 35-10 (September 21, 1973). The Air Force's current policy is AFP 160-44 (August 1977).

The Marine Corps' policy as of July 9, 1975 permitted temporary beard growth not to exceed one-fourth inch where medically prescribed. Marine Corps Order 6310.1. The Marine Corps' current policy is Marine Corps Order 6310.1A (August 15, 1977). See Alexander & Delph, "Pseudofolliculitis Barbae in the Military: A Medical, Administrative and Social Problem," *Journal of the National Medical Association*, 66 J.N.M.A. 459 (1974).

The Fourth Circuit Court of Appeals affirmed for the reasons set forth in the District Court's decision (App. 1a-2a).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The writ should be granted for two reasons. First, the decision of the court below in this case conflicts with decisions of this Court and several Courts of Appeals. Second, the decision presents an important federal question regarding the scope of the "business necessity" defense where an individual is denied employment solely on account of a physical characteristic that is directly traceable to race.

Racial discrimination can be established by demonstrating that an individual has been subjected to "disparate treatment" or "disparate impact" on account of race. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-336 n. 15 (1977).[4] The

[4] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-806 (1973) (disparate treatment); *Furnco Construction Co.* v. *Waters*, 57 L.Ed. 957 (1978) (disparate treatment); *Board of Trustees of Keene State College* v. *Sweeney*, —— U.S. ——, 47 U.S.L.W. 3330 (November 13, 1978) (disparate treatment); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-432 (1971) (disparate impact); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 422, 425 (1975) (disparate impact); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 137 (1976) (disparate impact); *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977) (disparate impact).

only non-statutory defense to a demonstration of racial discrimination that has been recognized by this Court in a "disparate impact" case is a counter-demonstration by the respondent of "business necessity". *Griggs* v. *Duke Power Co., supra,* 401 U.S., at 431; *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S., at 425 (1975). *Cf. Dothard* v. *Rawlinson, supra,* 433 U.S., at 329 (1977); *Los Angeles Dept. of Water and Power* v. *Manhart,* 435 U.S. 702, 716 n. 30 (1978).

In *Griggs* v. *Duke Power Co., supra,* 401 U.S., at 431, this Court held:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

See also *Los Angeles Dept. of Water and Power* v. *Manhart, supra,* 435 U.S., at 716 n. 30.

Thereafter, this Court indicated that the existence of a less discriminatory alternative that serves the employer's interests would defeat a "business necessity" defense. *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S., at 425.

Then, this Court held that in order to fulfill the "business necessity" test, the practice "must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge". *Dothard* v. *Rawlinson, supra,* 433 U.S., at 332 n. 14.

Lower courts have concluded that the defense of "business necessity" requires a demonstration by the employer that: (a) it has a business purpose for its

treatment of the individual that is necessary for the safe and efficient operation of its business;[5] (b) its treatment of the individual was necessary to achieve that business purpose;[6] and (c) the desired objectives cannot be achieved through a method which has less discriminatory impact.[7]

Here, petitioner proceeded under a "disparate impact" analysis and the court below found that petitioner had established that his exclusion from further job opportunities with respondent was directly traceable to his race. Having found that petitioner had sustained his initial burden in a "disparate impact" case, the court below held that proof by respondent of a "business purpose", rather than a "business necessity", was a sufficient defense where only one individual had been excluded from job opportunities on account of race.

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[5] See, *e.g., Waters* v. *Wisconsin Steel Works of Int'l. Harvester, Co.,* 502 F.2d 1309, 1321 (7th Cir. 1974), *cert. denied sub nom Bricklayers, Local 21* v. *Waters.* 425 U.S. 997 (1976) ("... [A]n employment practice 'can be justified only by showing that it is necessary to the safe and efficient operation of the business' ..."); *United States* v. *St. Louis-San Francisco Ry. Co.,* 464 F.2d 301, 308 (8th Cir. 1972) (*en banc*), *cert. denied sub nom United Transportation Union* v. *United States,* 409 U.S. 1116 (1973) (The discriminatory policy "must not only *foster* safety and efficiency, but must be *essential* to that goal".) (Emphasis in the original.)

[6] See, *e.g., United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652, 662 (2nd Cir. 1971) ("Necessity connotes an irresistible demand.").

[7] See, *e.g., United States* v. *Bethlehem Steel Corp., supra,* 446 F.2d, at 662. ("If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued."); *Wallace* v. *Debron Corp.,* 494 F.2d 674, 677 (8th Cir. 1974).

By substituting a "business purpose" standard, the court below adopted what was rejected in *Griggs* and its progeny. Moreover, by substituting a "business purpose" standard because petitioner was the only individual before the court, the court below rejected in principle the recent holding of this Court that emphasizes that the Act is designed to protect individuals from unfair treatment linked to a protected characteristic.

> The statute makes it unlawful "to discriminate against any *individual* . . . because of such *individual's* race" . . . The statute's focus on the individual is unambiguous . . . Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes.

Los Angeles Dept. of Water and Power v. *Manhart, supra,* 435 U.S., at 708-709. (Emphasis in original).

Finally, the lower court ignored the plethora of evidence that demonstrated that alternatives short of discharge existed. In doing so, it ignored or misapplied the holdings of this Court in *Moody,* 422 U.S., at 425, where it held the existence of some less burdensome alternative requires that judgment be entered for the discriminatee. Here, the respondent could have achieved its business purposes by simply notifying petitioner's fellow employees and its customers that petitioner had been exempted because of medical necessity. Where the evidence at trial established that respondent had exempted an employee at the same store not for reasons of medical necessity, but rather because of personal preference, it would seem hard put to argue that its business purposes could not have been served equally well by that simple expedient.

Because there is an evident conflict between the decision below and the opinions of this Court and several Courts of Appeals, it would be highly desirable to have the issues resolved by this Court to eliminate confusion as to the allocation of burdens of proof in a "disparate impact" case and the meaning of "business necessity".

CONCLUSION

In *Griggs,* this Court forbade the use of "artificial, arbitrary and unnecessary barriers to employment", 401 U.S., at 431, and held that the Act is designed to make race irrelevant. 401 U.S., at 436. Here, the petitioner performed his duties and responsibilities as an employee in an "efficient and trustworthy" manner. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S., at 801. Solely because of a physical characteristic that is directly linked to his race, he was unable to comply with respondent's grooming code. The decision below permits that racial characteristic to be determinative even though it was demonstrably "artificial, arbitrary and unnecessary". 401 U.S., at 431. Such treatment would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . ." *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972). *Cf. Frontiero* v. *Richardson,* 411 U.S. 677, 686 (1973).

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ROBERT B. FITZPATRICK
LANA KAY JONES
FITZPATRICK & JONES

1707 N Street, N.W., Suite 300
Washington, D.C. 20036
(202) 737-3334

Attorneys for Petitioner

December 5, 1978

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 1978, three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit were sent by first class mail, postage prepaid, to James Patrick McElligott, Jr., of the firm of McGuire, Woods & Battle, 1400 Ross Building, Richmond, Virginia 23219.

/s/ ROBERT B. FITZPATRICK

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-2234

MR. ANDREW WOODS, *Appellant*,

versus

SAFEWAY STORES, INC., *Appellee*,

No. 76-2235

SAFEWAY STORES, INC., *Appellant*,

versus

MR. ANDREW WOODS, *Appellee*.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond, Robert R. Merhige, Jr., District Judge

Argued June 9, 1978 Decided July 24, 1978

Before WINTER and WIDENER, Circuit Judges, and THOMSEN*, Senior District Judge

Robert B. Fitzpatrick for Appellant in 76-2234 and for Appellee in 76-2235; James Patrick McElligott, Jr. (William H. King, Sr., John M. Oakey, Jr., McGuire, Woods & Battle on brief) for Appellee in 76-2234 and for Appellant in 76-2235.

* Senior District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

In No. 76-2234, plaintiff below appeals from a judgment in favor of his former employer, Safeway Stores, Inc., rendered by the district court after a full trial on the merits of an action brought by plaintiff under Title VII of the Civil Rights Act of 1964, as amended. We affirm the judgment for the reasons fully and carefully stated by the district judge in discussing the merits of plaintiff's case. *Woods* v. *Safeway Stores, Inc.*, 420 F. Supp. 35 (E.D. Va. 1976).

This decision makes it unnecessary to reach the question of the timeliness of plaintiff's filing of his charge with the Equal Employment Opportunity Commission (EEOC), which the district judge decided in favor of plaintiff. Defendant's appeal, No. 76-2235, is therefore dismissed.[1]

No. 76-2234—Affirmed

No. 76-2235—Dismissed

[1] Plaintiff's motion for leave to file the affidavit of the Director of the Washington, D.C. office of EEOC has been granted.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-2234

MR. ANDREW WOODS, *Appellant*,

versus

SAFEWAY STORES, INC., *Appellee*,

No. 76-2235

ANDREW WOODS, *Appellee*,

versus

SAFEWAY STORES, INC., *Appellant*.

Order

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Thomsen for a panel consisting of Judge Winter, Judge Widener, and Judge Thomsen.

Filed September 6, 1978
U. S. Court of Appeals
Fourth Circuit

For the Court,
/s/ WILLIAM K. SLATE, II
CLERK

APPENDIX C

Filed July 15, 1976

Clerk, U. S. District Court
Richmond, Va.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-0321-R

ANDREW WOODS, *Plaintiff*,

v.

SAFEWAY STORES, INC., *Defendant*.

Memorandum

This action is brought by the plaintiff to redress an alleged violation of the provisions of Title VII of the Civil Rights of 1964, *as amended* 42 U.S.C. § 2000e *et seq.* Plaintiff seeks injunctive and other appropriate equitable relief including an award of back pay. Jurisdiction over the controversy is premised on § 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f), and by 28 U.S.C. § 1343(4).

The plaintiff, a black citizen of the United States, is a resident of the Commonwealth of Virginia. Defendant Safeway Stores, Inc. (hereinafter "Safeway") maintains a chain of retail grocery stores throughout the Commonwealth of Virginia, one of which, Store No. 365, is located in Hampton, Virginia. Safeway is a Maryland corporation with its principal office in Oakland, California and is an employer within the meaning of § 701(b) of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-(b).

The Court makes the following findings of fact and conclusions of law:

In November, 1973, plaintiff, then 19 years of age, applied for a position at defendant's Store No. 365, Hampton, Virginia. Upon the recommendation of another black employee, he was hired by the store manager.[1] Pursuant to directions, he reported to work on Monday, November 12, 1973, and continued his employment at that facility until discharged on June 28, 1974. The basis of the discharge was the plaintiff's failure to adhere to the defendant's local employee grooming code;[2] the plaintiff grew a beard

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[1] The Court finds, however, that the plaintiff was not informed of the grooming regulations until he had given up other employment and had begun work at Safeway. Accordingly, the parties will be requested to submit briefs on whether, pursuant to this finding, the plaintiff may recover on any pendant state claims.

[2] The Safeway "Employee Handbook" contains the following passage:

> *Personal Appearance and Cleanliness.* Customers like to shop in a store where the atmosphere is friendly and helpful. In comparing one store with another, the customer may say that one has "personality" or a good image where the other is unfriendly or cold. Consistently well groomed and friendly employees help to create the image or "store personality" we seek. The customers recognize this atmosphere in a store and it influences their store selection.
>
> It is the responsibility of management to establish personal appearance and grooming standards so that employees will know what is expected of them. It is impossible and impractical to spell out every possible detail in this area. However, the general standard for our store employees are outlined and illustrated here in these pages. If you have any questions concerning these policy standards, you should discuss them with your manager.
>
> We should all strive to present our best personal appearance, and that is all that the Company asks or wants.
>
> • • •
>
> *Personal Appearance Male Store Employee.*
>
> • • •
>
> Face must be smooth shaven. Mustaches are permitted, but if worn should not extend below the lower lip. Goatees of any style are not permitted. . . .

on advice of his dermatologist in the treatment of a condition of pseudofolliculitis barbae ("PFB"), a condition that afflicts, almost exclusively, members of the black race.

On July 2, 1974, through Local 233 of the Retail Clerks International Association, plaintiff filed a grievance against the defendant. Subsequent to an appropriate hearing, and in a decision dated December 4, 1974, the arbiter found against the plaintiff. No allegation had been made in that proceeding of racial discrimination; the sole issue before the arbiter was whether the plaintiff had been discharged for proper cause.

On December 30, 1974, plaintiff filed a sworn charge with the Equal Employment Opportunity Commission ("EEOC") against the defendant in which he alleged that his discharge was racially discriminatory. On July 7, 1975, the EEOC issued to the plaintiff a notice-of-right-to-sue letter which he received on July 9, 1975. *See* § 706(f)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1). Thereafter, on July 14, 1975, plaintiff filed this action. Section 706(e) of the Act, 42 U.S.C. § 2000(e)-5(e), requires a charging party to file a charge with the Equal Employment Opportunity Commission "within 180 days after the alleged unlawful employment practice occurred . . ." The date of discharge as to the plaintiff was June 10, 1974. It was not until 203 days later, December 30, 1974, that plaintiff filed a charge against the defendant. Ordinarily, in the absence of a tolling of the requirements of Section 706(e), plaintiff's instant claim would be time barred. *See Burwell* v. *Eastern Airlines, Inc.*, 68 F.R.D. 495 (E.D.Va. 1975). For reasons which follow, however, the Court, while of the view that resort to the grievance process does not toll the limitations period, holds that the plaintiff's claim is nevertheless not time barred.

Prior to the Supreme Court's rulings in *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), with few

exceptions courts that had occasion to address the issue concluded that the filing of a labor grievance procedure did toll the filing time requirements of the Civil Rights Act of 1964. *E.g.*, *Sanchez* v. *Trans World Airlines, Inc.*, 499 F.2d 1107 (10th Cir. 1974); *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 826-27 (7th Cir. 1972); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970). *Cf. Reynolds* v. *The Daily Press, Inc.*, 5 EPD ¶ 7991 (E.D. Va. 1972) (dicta); *Phillips* v. *Columbia Gas of West Virginia, Inc.*, 347 F. Supp. 533, 538 (S.D.W.Va. 1972) (dicta), *aff'd*, 474 F.2d 1342 (4th Cir. 1973). Subsequent to the aforementioned Supreme Court rulings, however, courts reconsidered, holding that the filing of a grievance will not toll the jurisdictional requirements of the Act. *Guy* v. *Robbins & Myers, Inc.*, 525 F.2d 124 (6th Cir. 1974), *cert. granted* (1976); *Roberts* v. *Lockheed Aircraft Corp.*, 11 FEP Cases 1440 (C.D. Calif 1975), *reconsidered and vacated on other grounds*, (C.D. Calif., Feb. 5, 1976). *But see Caldwell* v. *Seaboard Coast Line Railroad*, C.A. No. C-C-75-133 (W.D.N.C. April 8, 1976).

In *Alexander* v. *Gardner-Denver Co.*, *supra*, the Supreme Court held that an individual is entitled to a de novo consideration of his/her Title VII cause of action in spite of the fact that he/she has pursued a labor grievance procedure to its completion. While that case is not dispositive of the question presented in the instant action, it does contain colorable language on the relationship between Title VII and the grievance process of collective-bargaining agreements.

> Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary power to enforce the statutory requirements; and it specifies *with precision* the jurisdictional prerequisites that an individual must satisfy before he is entitled to insti-

tute a lawsuit. In the present case, these prerequisites where met when petitioner (1) filed *timely* a charge of employment discrimination with the Commission and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 U.S.C. §§ 2000e-5(b), (e), and (f).

415 U.S. at 47. (Emphasis added).

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractural and statutory rights is not officiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

415 U.S. at 49-50.

Both rights have legally independent origins and are equally available to the aggrieved employee.

415 U.S. at 52.

[I]n instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process.

415 U.S. at 54. The Court in that case specifically and emphatically noted that the arbitration process established in collective bargaining agreements and the adjudication process established in Title VII of the Civil Rights Act of 1964 are completely distinct and independent processes.

In *Johnson* v. *Railway Express Agency, supra,* it was held that the timely filing of an employment discrimination charge with the EEOC, pursuant to § 706 of Title VII of the Civil Rights Act of 1964, did not toll the running of the limitation period applicable to an action based on the same facts brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981. The Court noted that since there is no relevant federal statute of limitations for a cause of action under § 1981, the controlling period was one provided in that instance by the law of Tennessee. It was noted that Tennessee statutes explicitly provided no tolling exceptions applicable to the case, and that a failure to toll the limitation period in issue would not seriously conflict with the purposes of Title VII.

Petitioner argues that a failure to toll the limitation period in this case will conflict seriously with the broad remedial and humane purposes of Title VII. Specifically, he urges that Title VII embodies a strong federal policy in support of conciliation and voluntary compliance as a means of achieving the statutory mandate of equal employment opportunity. He suggests that failure to toll the statute on a § 1981 claim during the pendency of an administrative complaint in the EEOC would force a plaintiff into premature and expensive litigation that would destroy all chances for administrative conciliation and voluntary compliance.

. . . But the fundamental answer to petitioner's argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII.

421 U.S. at 465-66. The Court continued, perhaps revealing its overriding philosophy of the case in footnote 13:

> We expressly note how little is at stake here. We are not really concerned with the broad question whether these respondents can be compelled to conform their practices to the nationally mandated policy of equal employment opportunity. If the respondents, or any of them, presently or actually engaged in such conduct, there necessarily will be claimants who are in a position now either to file a charge under Title VII or to sue under § 1981. The question in this case is only whether this particular petitioner has waited so long that he has forfeited his rights to assert his § 1981 claim in federal court.

421 U.S. at 467 fn. 13. Mr. Justice Marshall, with whom Justices Douglas and Brennan joined, dissented in part contending that the majority's failure to apply the tolling principle undermines the foundation of Title VII and frustrates the congressional policy of providing alternative remedies. "Forced compliance with a short statute of limitations during the pendency of a charge before the EEOC would discourage and/or frustrate recourse to the congressional favored policy of conciliation." 421 U.S. at 472.

Additionally, the majority rejected the argument that the timely filing of a charge with the EEOC has the effect of placing the charged employer on notice that a claim of discrimination is being asserted, thus alleviating the need for strict adherence to the limitations period. "Only where there is *complete identity* of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period." 421 U.S. at 467, fn. 14. (Emphasis added).

The import of the *Johnson* case is apparent; the policies behind Title VII do not support an argument for the tolling of a limitation period based solely on the pursuit of an independent remedy. Since the Supreme Court concluded

in *Alexander* that labor arbitration and Title VII adjudications are distinct and separate procedures, it would be inappropriate for this Court to hold that an arbitration proceeding does toll the limitations period congressionally enacted in Title VII.

The plaintiff has attempted to distinguish the *Johnson* holding on several grounds. First, it is argued that *Johnson* involved only a judgment on the values implicit in the Tennessee statute of limitation applied to 42 U.S.C. § 1981, and was not an evaluation of the policy behind Title VII. The language of the opinion is clearly to the contrary. *E.g.*, 421 U.S. at 465-66. Second, it is argued that the policy of encouraging "in-house" resolution of claims through arbitration before the administrative machinery of the EEOC is engaged, is stronger than the policy of encouraging EEOC action before resort to the courts under § 1981. However, the answer to the former position applies with continued force to the latter—Congress clearly has created a remedy in Title VII that is separate and distinct from labor-agreement arbitration; it would be inimical to this independency to have one remedy toll the operation of the other. *E.g.*, 421 U.S. at 465-66. Furthermore, while the court's holding may encourage employees to file grievances with the EEOC before arbitration is concluded, there is clearly room in the Title VII procedure for a court to stay any judicial action on a Title VII allegation until the arbitration has concluded. The end result therefore may not increase litigation in the courts, although it may well increase the number of *concurrent* EEOC administrative and labor arbitration proceedings. It is not at all clear that arbitration will be avoided, as is contended by the plaintiff. Third, it is argued that the purposes and rationales behind any limitation period have been satisfied by the prior resort to arbitration; the employer has been put on notice of the claim and may take steps to preserve his case. The Supreme Court has held, however, that the claims must be identical for the position to have substance. 421 U.S. at

566-67, fn. 14. In the instant action, the arbitration did not involve any claims of racial discrimination, and it can hardly be said that the arbitration proceeding put the employer on notice of the claims asserted in the instant suit. In a very real sense, the plaintiff "slept" on his claims of racial discrimination. Finally, it should be noted that there are no claims of government or employer delay or inducement to delay; the facts are plain—the plaintiff simply did not file within the specified time limit.

The plaintiff's final contention in this regard, and one in which the Court concurs, is that if the Court holds as it does that the limitations period is not tolled by a resort to the grievance process under the principles of the *Johnson* decision, the holding should be given only prospective application from the date of the decision in *Johnson*. It is urged that since *Johnson* was decided in May of 1975, and the plaintiff filed his sworn charge with the EEOC in December of 1974, *Johnson* principles ought not be applied to the plaintiff so as to bar his claims in the instant action. Non-retrospectivity is controlled by the standards enumerated in the Supreme Court's holding of *Chevron Oil Company* v. *Hudson*, 404 U.S. 97, 106-07 (1971):

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively was to establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . Second, it has been stressed that we "must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this court could produce substantial inequitable results if acquired retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

(Citations omitted). Since (1) all previous authority on the issue had held that the pursuit of arbitration pursuant to a collective-bargaining agreement does toll the limitations period specified in Title VII, (2) the plaintiff would clearly be prejudiced by retroactive application, as his claim would be lost, and (3) Title VII evinces a strong policy in favor of airing employment discrimination grievances, this Court is satisfied that the *Johnson* principles, as applied in the instant case, should be given prospective effect from the date of that decision. *See Roberts* v. *Lockheed Aircraft Corp.*, Nos. 75-3093-JWC, 75-3095-JWC, 75-3111-JWC, 75-3112-JWC (C.D.Calif., Feb. 5, 1976), *Hambrick* v. *Royal Sonesta Hotel*, 403 F. Supp., 943, 944-45 (E.D.La. 1975); *Bush* v. *Wood Brothers Transfer*, 398 F. Supp. 1031 (S.D.Tex. 1975). Accordingly, the plaintiff will be considered as having filed a timely sworn charge with the EEOC.

Turning now to the merits of the controversy, it is plaintiff's position that he was discharged by the defendant on the basis of racially tainted criteria. Defendant's regulations on grooming[3] that included a prohibition against beards in its retail stores were admittedly violated by the plaintiff in his efforts to cure a skin condition—PFB. The violation led to his dismissal. PFB, colloquially known as "razor bumps" or "shaving bumps," is a condition far more common and much more severe among blacks than members of other races. It is caused by the ingrowing of hairs in the beard area of the face and neck. Regular shaving with a sharp blade is usually the precipitating stimu-

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[3] See footnote 2 *supra*.

lus, the hairs become sharpened points, and the natural curvature of the hair and the hair follicle—aggravated in blacks—facilitates ingrowth. Papules form where the hair is ingrown as the result of an inflamatory [sic] foreign body reaction. In severe reactions, papules may become pustules and subsequently abscesses. If the condition is not treated, a danger of permanent disfigurement of the fact exists. The evidence satisfies the Court that in its severe form, PFB is peculiar to blacks.

The plaintiff, in an effort to conform with the defendant's grooming regulations, began by procuring shaves with electric clippers at a local barber shop. Understandably, the costs proved to be prohibitive. He thereafter attempted to remove his facial hair with a depilatory—a powder or cream that dissolves the hair above the skin line. The depilatory in plaintiff's instance caused his skin to redden and develop "bumps." He thereafter attempted to shave once with a bladed razor and twice with an electric razor but both techniques aggravated the inflamation [sic] of his skin. Plaintiff thereafter returned to the use of a depilatory and sought the assistance of a dermatologist. His dermatologist diagnosed his infliction as PFB, instructed him to discontinue shaving, and provided him with an explanatory note to his employer. Subsequent visits by the plaintiff to his dermatologist resulted in the same recommendation. Despite his doctor's letters and verbal communications of explanation, Safeway terminated plaintiff on account of the fact that he had a beard and hence was in violation of its grooming code.

The testimony of experts introduced at trial gives rise to a conclusion that from 45% to 55% of all black males are afflicted with a form of PFB, although the number affected by its severe stages is limited, and that the affliction is typically caused by cutting or clipping the hair close to the skin so as to create a hair lance that is, by curving

growth, forced back into the skin. Furthermore, most blacks can avoid the condition by using a depilatory appropriately and in a timely fashion, or by having a barber shave them with the use of clippers. Once the affliction, however, has been contracted, treatment typically consists of growing the hair out into a beard until irritation subsides. It was estimated by at least one dermatologist that of those suffering from the condition 20-22% needed beard therapy. A second method, apparently preferred by doctors but usually not prescribed because of its tediousness, is to pluck individually the ingrown hairs from the skin. Thereafter, the skin is medically treated.

There is no contention here that Safeway adopted its growing standards with the purpose or intent to discriminate against black employees. Indeed, until the filing of the complaint with the EEOC, there is nothing in evidence to indicate that Safeway had any knowledge of the condition known as PFB. Furthermore, the evidence is undisputed that Safeway applies that "no beard" policy uniformly to both white and black males. Plaintiff argues, however, that the grooming regulation *operates* to deprive him of employment on racially tainted criteria, and, accordingly, is a violation of § 703 of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-2:

> (a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individuals with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of

> such individual's race, color, religion, sex, or national origin.

The statute has been interpreted to prohibit even racially neutral employment practices if same have a significantly disparate impact on members of a distinct racial group, and if they cannot be justified by proven business necessity.

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.
>
> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Griggs v. *Duke Power Company,* 401 U.S. 424, 431 (1971). See also *Gilbert* v. *General Electric Company,* 519 F.2d 661, 664 (4th Cir. 1975); *Wallace* v. *Debron Corporation,* 494 F.2d 674 (8th Cir. 1974); *Gregory* v. *Litton Systems, Inc.,* 472 F.2d 631-32 (9th Cir. 1972). The evidence adduced in the instant case does establish that the "no beard" policy can act to disqualify an otherwise qualified black from employment solely on the basis of a genetic characteristic peculiar to his race.

The Court concludes, however, that although some discriminatory impact may result from the "no beard" regulation, it does not violate the Act because the rule is justified by a legitimate business purpose. The business purpose doctrine was best stated for this jurisdiction by the late Judge Sobeloff in *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 798 (4th Cir. 1971):

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; carry out the business purpose it is alleged to serve; and there must be available no acceptable or alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. (Footnotes omitted).

Of necessity, however, the doctrine's application will vary with (1) the nature of the business involved, (2) the business practice employed, and (3) the degree of the discriminatory impact. In the *Robinson* case, for example, the Court dealt with a discriminatory seniority system in a tobacco plant. The system acted to continue the effects, for numerous employees, of a past history of intentional hiring discrimination. The Court, quite understandable, applied a fairly stringent business purpose doctrine test.

In the instant case, the business involved is the retail food business, a highly competitive multi-denominational industry. Since the product sold is intended, for the most part to be consumed, overall store hygiene and an appearance of cleanliness is an important aspect of customer preference. It was the judgment of of the Safeway management tending stores in the Virginia area, that a grooming code, maintaining an image of cleanliness, was necessary to attract and retain customers. The code was carefully drafted to prevent misunderstandings and any misuse of regulations by both employer and employee. The right of an employer to maintain grooming standards has been upheld in a plethora of Title VII litigation. *E.g., Brown* v. *D.C. Transit System, Inc.,* 523 F.2d 725 (D.C. Cir. 1975); *Willingham* v. *Macon Telegraph Publishing Co.,* 507 F.2d 1084 (5th Cir. 1975) (en banc); *Baker* v. *California Land Title Company,* 507 F.2d 895 (9th Cir. 1974); *Dodge* v. *Giant Food, Inc.,* 488 F.2d 1333 (D.C. Cir. 1973); *Fagan* v. *Na-*

tional Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1972); *Boyce* v. *Safeway Stores, Inc.*, 351 F.Supp. 402 (D.D.C. 1972); *Baker* v. *California Land Title Co.*, 349 F. Supp. 235 (C.D. Calif. 1972). The defendant, exercising sound business judgment, concluded that a "no beard" rule was a necessary part of its grooming code.

It is of little consequence that other Safeway divisions in other parts of the country, or that other stores within the Hampton area permit their retail store employees to wear beards. The Court finds that it was the legitimate business decision of the defendant, reflecting on the local clientele, to prohibit beards in its Virginia stores, and that decision must be given appropriate deference. This is not to say, however, that appearance codes with provisions that have no basis or foundation in past history or practice, will be respected if discriminatory impact is shown. It is only those provisions that have a relation to existing human preference scales which will be countenanced.

Furthermore, in applying the business purpose standard, consideration must be given to the fact that the degree of impact of the employment practice in question is slight. The sole black that has been prejudiced by the "no beard" regulation appears to be the plaintiff, even though Safeway has a number of other black employees. The testimony at trial satisfied the Court that a substantial majority of black males either do not have PFB or can cope with it and continue to shave their faces if care is taken. The regulation is neutral on its face; no discriminatory intent was manifest, and no past discriminatory practice is perpetuated. Finally, it must be noted that Safeway did not rigidly apply the "no beard" policy. It permitted the plaintiff to continue to work for some time despite his beard, by scheduling his time to minimize customer contact, in the hope that the condition would improve. Plaintiff's termination was accompanied with a stipulation that he would be reinstated if the condition was corrected. Additionally, plaintiff was offered work in the defendant's

warehouse, an area which did not require public contact and, therefore, had no grooming code. The location of the warehouse, however, proved to be a substantial distance from the plaintiff's home and was not a financially feasible alternative.

In conclusion, the Court finds that a business purpose exists to support defendant's "no beard" rule, and that the rationale behind the rule overrides the slight racial impact resulting therefrom.

A appropriate order will issue.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: July 15, 1976

Supreme Court, U. S.
FILED
JAN 4 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-901

MR. ANDREW WOODS,

Petitioner,

v.

SAFEWAY STORES, INC.,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

J. Robert Brame, III
James Patrick McElligott, Jr.

McGuire, Woods & Battle
1400 Ross Building
Richmond, Virginia 23219

Counsel for Respondent Safeway Stores, Inc.

January 4, 1979

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I. QUESTION PRESENTED

Did the trial court clearly err when it found that Safeway's "no beard" rule did not violate Title VII due to the business justification for Safeway's grooming code and the absence of any substantial racial impact?

II. STATEMENT OF THE CASE

The record reveals only two individuals who have ever claimed to be medically unable to comply with Safeway's "no beard" policy—one white man and one black man. Safeway excused the white employee from complying with the policy for several weeks due to his physician's advice that he not shave due to a skin irritation. The only other Safeway store employee permitted to grow a beard in the Richmond Division is Andrew Woods, the petitioner in this case. Woods worked with a beard from January 30, 1974 to June 10, 1974.

Prior to working at Safeway, Woods wore a mustache, goatee, and mutton chop sideburns as a matter of personal preference. During this period, he controlled his facial hair by using electric clippers or a chemical depilatory, "Magic Shave," without adverse effect.

On the evening of his first day at Safeway, Woods had his beard removed by barber's clippers and controlled his beard for several weeks by occasional "trims" without adverse effect. However, after using a series of other methods to remove his beard—straight razor, electric razor, and chemical depilatory, Woods developed *pseudo folliculitus barbae* ("PFB"), or "razor bumps."

PFB results from ingrown hairs in the beard area of the face and neck. Regular shaving with a sharp blade usually precipitates the condition. In especially curvy hair the sharpened end of the hair follicle imbeds itself in the skin.

Treating PFB requires removal of the hair follicles from the skin, either by removing each entrapped hair individually or by growing a beard "until irritation subsides," usually thirty to sixty days. (Findings of Fact and Conclusions of Law of District Court; Appendix C to Petition for Writ of Certiorari, page 15a). Because of the nature of PFB, a

permanent beard will assure that the hairs will not again penetrate the skin. But individuals can utilize other means of controlling their facial hair and still avoid PFB. Two of plaintiff's expert witnesses, Doctors Skipworth and Alexander, testified that following growth of a 30 day beard to heal his "razor bumps," an individual with PFB could control his beard by means of depilatories, electric clippers, or other devices.

Upon developing "razor bumps," Woods sought out his personal physician, Dr. Watkins, who advised him to grow a beard. Safeway permitted Woods to continue working in the store on the assumption that this condition was temporary. When Dr. Watkins advised that Woods would have to continue growing his beard for an indefinite period of time, Safeway advised Woods that he could no longer work in the store with a beard. Safeway offered Woods a position in Safeway's warehouse, where employees may wear beards. Woods declined this position.

With the assistance of his union, Woods protested his discharge through the grievance/arbitration procedures of his collective bargaining agreement. After reviewing Woods' claim of medical disability and the background of the grooming standard, the arbitrator upheld Safeway's action. After this decision—and 203 days after his discharge—Woods filed a charge of employment discrimination with the Equal Employment Opportunity Commission. This suit followed.

On the day this case was tried, Woods wore no beard and fully complied with Safeway's grooming standard, except for his mutton chop sideburns. Dr. Alexander, one of three dermatologists called by Woods, testified that Woods had been shaved or clipped about six or seven times within a few weeks prior to trial. Woods testified that he "was ordered by

Dr. Alexander to shave so that when I come to court today it will be neat and people could see it, so the judge and whoever else was present could notice it."

Indeed, Dr. Alexander's testimony indicated that he did not share the view that Woods was physically unable to control his beard:

BY MR. OAKEY:

> Q. If you shaved him the first time—you suggested he shave the first time and see how—to see if that would work. Why did you have him—why [did] he get clipped the second time?
>
> A. I really don't follow you.
>
> Q. How many times has he been shaved or clipped in the last couple of weeks?
>
> A. To my knowledge, about six or seven, possibly in the last couple of weeks.
>
> Q. Is that the number of times you would have him clipped, or would you do it one time and see how it develops?
>
> A. Every other day is a reasonable approach to this.

Dr. Alexander also testified that in the event that Woods was unable to accommodate his beard with electric clippers, he should, following growth of a 30-day beard, attempt to use a chemical depilatory. Woods admitted in his testimony that Dr. Alexander had reached no conclusion with respect to whether or not he would be able to shave in the future.

Indeed, with the exception of Dr. Watkins, the physician who first treated Woods, the doctors who testified at trial, including two of Woods' own witnesses, agreed that individuals with PFB could accommodate themselves to a "no beard" policy if they chose to do so. This was particularly true if the employer permitted the growth of a temporary beard, as Safeway did.

Dr. Murrell testified that PFB was unquestionably a minor ailment which need not require the growth of a permanent beard since facial hair could be controlled by techniques which did not aggravate this condition. Dr. Skipworth, called by Woods, admitted that it was rare that an individual could not accommodate to a "no beard" policy, and that facial hair could be removed by ways that did not induce or aggravate PFB. Dr. Alexander not only testified that individuals with PFB could accommodate to a "no beard" policy, he indicated by his own advice to Woods that the petitioner in the instant case was capable of controlling or removing his facial hair.

The testimony of these three dermatologists contrasted sharply with that of Dr. Watkins, who had stressed that Woods "could not solve his problem except by allowing his beard to grow." However, Dr. Watkins admitted that when he advised plaintiff to continue his beard, he was not aware that Woods had previously controlled the growth of his facial hair by means of electric clippers and depilatories.

Based on the medical evidence in the case, the trial court found that "the degree of impact of the employment practice in question is slight." Despite the substantial numbers of blacks employed by Safeway, the court found Woods the only black individual who appeared to have been affected by the "no beard" policy. The court found that the business justification for the "no beard" rule overrode any slight racial impact that might result from the rule. Dismissing Woods' claim of employment discrimination, the court entered judgment for Safeway.

Because the Court of Appeals for the Fourth Circuit affirmed the judgment of the district court with respect to the merits of Woods' case, the Court of Appeals did not reach the question whether Woods' EEOC charge, filed 203

days after his discharge, met the jurisdictional requirements of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 e-1, *et seq.*

III. ARGUMENT

Woods essentially asks this Court to reverse findings of fact made "fully and carefully" by the trial judge after full trial on the merits and affirmed, *per curiam,* by a unanimous panel of the court of appeals. (Opinion of Court of Appeals, Appendix A to Petition, page 2a.) The decision below does not conflict with decisions of this Court or of any other court of appeal. Indeed, this is the first and apparently only published decision considering this issue, despite the prevalence of similar grooming standards throughout this country. Woods concedes that he knows of no other blacks aggrieved by Safeway's policy.

Griggs v. *Duke Power Co.,* 401 U.S. 424, 431 (1971) held that a *prima facie* case of discrimination could be established, even in the absence of intent, if a facially neutral policy were "invidiously to discriminate on the basis of racial . . . classification." *See also General Electric Co.* v. *Gilbert,* 429 U.S. 125, 137 (1976). However "one complaining of unintentional discrimination due to employment qualifications must [first] show that the challenged standard operates to disqualify members of a protected group of job applicants to which the complainant belongs at a 'substantially higher rate' than other groups of applicants." *Coopersmith* v. *Roudebush,* 517 F.2d 818, 822 (D.C. Cir. 1975). "It is clear that this initial burden to show discriminatory effect is on the party challenging the job qualification." *Id. See also General Electric Co.* v. *Gilbert, supra,* 429 U.S. at 137 footnote 14 (1976); *Harper* v. *Transworld Airlines, Inc.,* 525 F.2d 409, 414 (8th Cir. 1975).

Neither the evidence nor the findings of fact suggest that the "no beard" policy disqualifies blacks at a higher rate than whites. The evidence reveals that only two individuals had experienced medical difficulties in complying with the "no beard" policy—one white and one black. Both were permitted to grow temporary beards in a effort to obtain remission of their difficulties.

Woods bases his claim of discriminatory effect solely on the incidence of PFB in black males, not on any evidence that Safeway's grooming policy has tended to exclude blacks. But the mere fact that PFB is more common in blacks than whites does not establish a *prima facie* case of discrimination. Woods was not discharged because he suffered from PFB, but because he failed to comply with Safeway's grooming standards.

In *General Electric Co.* v. *Gilbert, supra,* this Court described the burden the plaintiff must meet to establish discrimination under the "disparate impact" test. The Court noted that the plan in *Gilbert* treated male and female employees alike by covering exactly the same categories of risk. *Id.* at 138. "[N]either is there a finding, nor was there any evidence which would support a finding, that the financial benefits of the Plan 'worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.' " *Id., quoting Geduldig* v. *Aiello,* 417 U.S. 484, 496 (1974). *Gilbert* teaches that the overall effect of the employment policy must be examined. Woods focuses on the incidence of a single medical problem and ignores that overall Safeway's uniform grooming policy has not adversely affected any racial group.

On the facts of this case, it is sheer fantasy for petitioner to assert that uniform enforcement of Safeway's grooming

standard constitutes "invidious discrimination" against blacks. "Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *City of Los Angeles* v. *Manhart*, ... U.S. ....., 98 S.Ct. 1370, 55 L.Ed.2d 657, note 20 (1978). (Emphasis in original.)

The decision below is consistent with *Griggs, Gilbert,* and decisions of courts of appeal of other circuits. *Smith* v. *Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977) held that Title VII permitted a company to discharge a black employee because of a back condition caused by sickle cell anemia, a blood disease found almost exclusively in blacks. The majority affirmed a grant of summary judgment for the employer. Even the dissent thought the plaintiff would have to show more than just a connection between race and bad backs:

> It would be necessary for him to bring forward evidence that sickle cell anemia produces bad backs in a high proportion of blacks and that substantially more blacks than whites were fired for bad backs (however caused).

Id. at 1290.

In this case, there is no evidence that blacks tend to have beards more than whites. The evidence shows that whites as well as blacks can have medical reasons for growing beards and can have skin ailments that interfere with their employment.

Moreover, the evidence overwhelmingly supports the trial court's finding that persons with PFB can comply with Safeway's grooming standard. Although one cannot fault Woods for following the advice of his doctor, neither can one conclude that this advice warrants a finding that Safeway's grooming standards violate Title VII.

In its Richmond Division alone, Safeway employs hundreds of black males presently complying with the grooming standard. Woods is the first and only black employee to claim that he is physically unable to comply with the rule.

Safeway's grooming standard, unlike that generally imposed by the military, does not demand the type of close shaving most irritating to PFB. Woods complied with Safeway's standard for weeks without adverse effect by merely clipping his beard. Safeway conducts no formal "inspections" of its store employees and detected Woods' beard only several weeks after he had ceased all efforts to control it. Indeed, the evidence suggests that Safeway's grooming standard imposes greater burdens on whites than blacks, whose dark skin more readily conceals a beard.[1]

The district court, who could observe Woods and evaluate the medical testimony firsthand, clearly did not view PFB as a serious impediment to employment. The fact that Woods removed his beard six or seven times during the weeks prior to trial demonstrates this strikingly.

Expert testimony and exhibits in the record below fully support the trial court's finding that the "business purpose" for the "no beard" rule overrides any slight discriminatory effect that the policy may have. The grooming code reasonably and effectively carries out these business purposes by regulating only the appearance of public contact employees.

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[1] At trial, it appeared that one black employee at Woods' former store, without knowledge of the store manager, had grown a small, barely visible tuft of hair, or "fly," under his lower lip. Contrary to the assertion at page 10 of petitioner's brief, this incident only underscores that Safeway does not enforce its grooming code with the exacting scrutiny of a drill sergeant.

Safeway has exhausted all acceptable alternative approaches to accommodating Woods' unique medical problems.

It is the function of the district court to determine the reasonableness of such an employment qualification, so long as its ruling is based on findings of fact which are not clearly erroneous. *Condit* v. *United Air Lines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978). The district court's opinion demonstrates that it understood the interests to be weighed in determining whether this grooming standard was job related. Woods' failure to show any substantial discriminatory effect of the "no beard" rule was the key to its finding.

The ruling below is consistent with decisions from other courts of appeal. In *Smith* v. *Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977), the Fifth Circuit, sitting *en banc*, held that an employer's exclusion of a black employee with a bad back did not have to be justified by evidence of business necessity, even though the practice allegedly had a disparate racial impact since the bad back resulted from the racially-linked condition of sickle cell anemia. The court reasoned that the business necessity of a good back could be *presumed* and affirmed dismissal of the discrimination claim on summary judgment. *See also Townsend* v. *Nassau County Medical Center*, 558 F.2d 117 (2nd Cir. 1977) *cert. denied*, 434 U.S. 1015 (1978).

Smith v. *Delta Air Lines, Inc.*, 486 F.2d 512 (5th Cir. 1973) affirmed a district court's ruling that even though blacks might have difficulty in conforming to a company's rule prohibiting facial hair, the rule did not violate Title VII.[2] Judge Tuttle observed that "[w]e review findings of fact in Title VII cases in the same manner as other fact

[2] It is significant that the black plaintiff in *Smith* never claimed that any blacks were physically unable to comply with this rule.

findings of the court are reviewed." *Id.* at 514. *See also Spurlock* v. *United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972) (college degree required for pilots).

Despite the hyperbole of opposing briefs, this case turns on its own facts and presents no issues of importance to persons other than the parties. The absence of reported cases on this question demonstrates that PFB presents no serious problem in private industry and raises no legal questions warranting this Court's consideration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. Robert Brame, III
James Patrick McElligott, Jr.

Counsel for Respondent
Safeway Stores, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 1979, three copies of the foregoing Brief in Opposition were mailed by first class mail, postage prepaid, to each of the following: Robert B. Fitzpatrick, attorney for petitioner, 1707 N. Street, N.W., Suite 300, Washington, D. C. 20036; Lawrence S. Blumberg, Esq., counsel for National Medical Association, One Rockefeller Plaza, Suite 1915, New York, New York 10020; and John W. Garland, counsel for National Black Veterans Organization, Center for Law and Social Policy, 1751 N Street, N.W., Washington, D. C. 20036.

/s/ J. Robert Brame, III

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-901

MR. ANDREW WOODS, *Petitioner*,

v.

SAFEWAY STORES, INC., *Respondent*.

PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT B. FITZPATRICK
LANA KAY JONES

FITZPATRICK & JONES
1707 N Street, N.W., Suite 300
Washington, D.C. 20036
(202) 737-3334

Attorneys for Petitioner

January 10, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-901

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v.

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PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

In compliance with Rule 24(4) of the Rules of the Court, petitioner will limit his response to matters first raised in respondent's opposition.

1. Respondent suggests that there is a "jurisdictional" issue in this case. Such is not the case. Petitioner's charge was filed with the Equal Employment Opportunity Commission ("EEOC") within the requisite 180-day period.[1]

[1] On June 28, 1974, respondent's Employee Relations Manager decided to discharge petitioner. The trial court believed that petitioner's charge was filed on December 30, 1974 and that that date was more than 180 days after the alleged unlawful employment practice occurred. The Court of Appeals allowed the affidavit of the Director of the Washington, D.C. office of EEOC to be filed. In that affidavit, the Director stated under oath that the charge had been filed on December 26, 1974. The EEOC had misfiled the document that reflected the correct filing date. As Christmas, December 25, 1974, was the 180th day after June 28, 1974, the charge was timely filed on December 26, 1974.

2. Respondent suggests that *all* cases of PFB can be treated without indefinite shaving abstinence; that the experts so testified: and that the trial court so held. Such is not the case. Drs. Alexander and Skipworth both testified that medical science has no effective treatment for *some* severe cases of PFB other than indefinite shaving abstinence. Even respondent's own expert corroborated this testimony. Moreover, all branches of the military recognize this medical reality. As there are few, if any, absolutes in science, none testified that the situation is constant and all hope that medical science will discover effective solutions for all. Nonetheless, the reality is that some individuals, like petitioner, can be treated effectively only by indefinite shaving abstinence.

3. Respondent suggests that the experts testified and the trial court found that Dr. Watkins ill-advised petitioner. Such is not the case. Both Dr. Alexander and Dr. Skipworth testified that Dr. Watkins' treatment plan was appropriate in the circumstances.[2] The trial court did not even intimate that Dr. Watkins' advice was anything other than proper.

4. Respondent suggests that petitioner could comply with its grooming code because petitioner was clean shaven at trial. Respondent does not mention that petitioner had shaved prior to trial in order that the trial court could observe the severity of his condition. Moreover, respondent does not mention that the pre-trial shaving caused a severe skin reaction and that at trial

[2] For example, Dr. Skipworth testified as follows:

Q. And what, sir, would you recommend as a course of treatment for the plaintiff?

A. To this point in time, the only effective treatment that I can—would recommend, would be to grow a beard.

petitioner had in excess of 100 papules on his face and some pustules.[3]

5. Respondent suggests that petitioner could have complied with its grooming code; that the experts so testified; and that the trial court so held. Such is not the case. Respondent suggests that petitioner could have complied because several years earlier he had used a depilatory once a month for about a year without adverse reaction, but respondent does not mention that when petitioner used the depilatory more frequently to comply with respondent's code, he had a severe reaction. Dr. Watkins testified that petitioner informed him of his prior shaving experiences and that in his judgment, petitioner's condition required indefinite shaving abstinence. The trial court did not question the propriety of Dr. Watkins' judgment and both Dr. Alexander and Dr. Skipworth testified that it was proper.

6. Respondent states that petitioner was offered a position in its warehouse, but does not state that the warehouse was some 80 miles from petitioner's home and that the trial court found that it "was not a financially feasible alternative".[4]

7. Respondent suggests that the opinion of the court below is consistent with the holding in *Smith* v. *Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977) (*en banc*). Such is not the case. In the *Smith* case, the court of appeals presumed that a "business necessity"

[3] There are photographs in the record of petitioner's appearance immediately before trial. In addition, there is extensive testimony by Dr. Skipworth in which he described petitioner's condition at trial.

[4] See 19a of Appendix to Petition.

existed for the employer's requirement that a manual laborer have a "good back". Here, the lower court found no "business necessity" for the discharge of petitioner, but nonetheless held that the discharge was lawful because a "business purpose" existed.

8. Respondent suggests that petitioner seeks in this Court to set aside the factual findings of the lower court. Such is not the case. This case presents important legal—not factual—questions for review. The lower court found that respondent discriminated against petitioner on the basis of his race, but further found that such discrimination was permissible because respondent had a "business purpose" for its treatment of petitioner. That decision is contrary to the holdings of this Court and several courts of appeal. It is that holding, and not the factual findings, that petitioner seeks to set aside.

9. Finally, respondent suggests that this controversy affects only petitioner and respondent. Such is not the case. The briefs of the National Medical Association and the National Black Veterans Organization alone dispel that suggestion.

CONCLUSION

For the reasons stated in the petition and the briefs of the movants, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ROBERT B. FITZPATRICK
LANA KAY JONES

FITZPATRICK & JONES
1707 N Street, N.W., Suite 300
Washington, D.C. 20036
(202) 737-3334

Attorneys for Petitioner

January 10, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 1979, three copies of the foregoing Petitioner's Reply to Opposition to Petition for a Writ of Certiorari were sent by first class mail, postage prepaid to each of the following: James Patrick McElligott, Jr., Esq., attorney for respondent, of the firm of McGuire, Woods & Battle, 1400 Ross Building, Richmond, Virginia 23219; Lawrence S. Blumberg, Esq., counsel for National Medical Association, One Rockefeller Plaza, Suite 1915, New York, New York 10020; and John W. Garland, Esq., counsel for National Black Veterans Organization, of the Center for Law and Social Policy, 1751 N Street, N.W., Washington, D.C. 20036.

/s/ ROBERT B. FITZPATRICK

MOTION FILED
DEC 14 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-901

MR. ANDREW WOODS, *Petitioner,*

v.

SAFEWAY STORES, INC., *Respondent.*

MOTION OF NATIONAL MEDICAL ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE NATIONAL MEDICAL ASSOCIATION, *AMICUS CURIAE*

LAWRENCE S. BLUMBERG, ESQ.

One Rockefeller Plaza
Suite 1915
New York, New York 10020
(212) 246-6950

Counsel for National Medical Association

Dated: December 14, 1978

Commercial Communications, Alexandria, Virginia

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-901

MR. ANDREW WOODS, *Petitioner,*

v.

SAFEWAY STORES, INC., *Respondent.*

MOTION OF NATIONAL MEDICAL ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National Medical Association ("NMA") hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari. Petitioner has consented to the filing of this brief, but respondent has denied such consent.

The National Medical Association, organized in 1895, is a professional association of physicians. Almost all of the members of the NMA are Black American physicians. The NMA's purposes, as set forth in its Charter, are "to raise the standards of the medical profession and of medical education; to stimulate favorable relationships among all

physicians; to nuture the growth and diffusion of medical knowledge; to sponsor the education of the public concerning all matters affecting the public health; to sponsor the enactment of just medical laws; and to eliminate religious and racial discrimination and segregation from American medical institutions".

NMA members are strongly committed to the eradication of all forms of discrimination, particularly in the area of medicine. In addition, the NMA is equally committed to assisting its members and all other physicians in an effort to provide the best possible advice and treatment to their patients. Increasingly over time, the members of the NMA and others have attempted in a variety of ways to draw more attention to *pseudofollicullitis barbae* (PFB).[1]

This case presents questions of great importance to patients afflicted by PFB and their advising physicians. The question of the proper advice and treatment to provide to a patient afflicted by PFB is a recurring one, which affects a large percentage of physicians, especially Black physicians.[2] The

[1] NMA Resolution issued at the August 1973 Convention; Resolution of American Academy of Dermatology issued on December 6, 1973. Both resolutions are trial exhibits in this case.

[2] The 1970 Census indicated that there were 6,002 Black physicians in the United States. U.S. Bureau of Census–*1970 Census of Population: Occupational Characteristics.* NMA believes that that number has increased to approximately 8,000. The number of Black dermatologists in the United States is believed to be approximately 100. This approximation is the NMA's rough extrapolation from a study of the American Medical Association. AMA Center for Health Services Research and Development: ***Physician Distribution and Medical Licensure in the United States 1974*** and ***A Sample Study of 1880 Black Physicians*** (AMA 1975). See also, Morrison, Nathan, ***Profile of the Black Physician and the Health Care Experience of United States Population by Color*** (Prentiss Hall, 1977).

advice given regarding PFB has often been tempered by the physician's perception of the so-called societal limitations.[3] The NMA believes that its perspective on and concerns about the issues raised by the petitioner should be considered by the Court as the opinion below has created considerable confusion and debate among our members and other physicians as to the proper advice and treatment to give to a patient with PFB.

In addition, NMA desires to participate in this matter as *amicus curiae* so that the Court will be provided with more detailed medical information on PFB than the petition provides. The petition necessarily concentrates on the specific facts and issues in this particular case. NMA's brief, on the other hand, concerns itself primarily with medical knowledge of PFB, in addition to a discussion of the effect that the lower court's decision has upon the physician-patient relationship.

[3] The earliest reference to this phenomenon in the extant literature is a pioneering article authored by Drs. Strauss and Kligman, *Pseudofollicullitis of the Beard*, 74 AMA Arch. Derm. 533, 537 (1956) ("Cessation of shaving provides a decisive method of clearing the disease, but its obvious disadvantage is its impracticability in a society that demands a shaven face.") This document is a trial exhibit in this case

We believe that our perspective and analysis will be of assistance to the Court and we most respectfully pray that the Court permit our brief as *amicus curiae* to be filed and considered.

Respectfully submitted,

LAWRENCE S. BLUMBERG, ESQ.

One Rockefeller Plaza
Suite 1915
New York, New York 10020
(212) 246-6950

Counsel for National Medical Association, Movant

December 14, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-901

MR. ANDREW WOODS, *Petitioner,*

v.

SAFEWAY STORES, INC., *Respondent.*

BRIEF OF NATIONAL MEDICAL ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LAWRENCE S. BLUMBERG, ESQ.

One Rockefeller Plaza
Suite 1915
New York, NY 10020
(212) 246-6950

Counsel for National Medical Association, Amicus Curiae

December 14, 1978

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BRIEF OF NATIONAL MEDICAL ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The National Medical Association (NMA), pursuant to Order of this Court, respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case.

INTEREST OF THE *AMICUS CURIAE*

The interest of NMA has been stated in the motion for leave to file this brief and therefore will not be repeated here.

STATEMENT OF THE CASE*

INTRODUCTION

Whenever our patients are denied the most effective and acceptable treatment for their diverse maladies, NMA is concerned. Whenever a court decision threatens to effectively exclude utilization of the most effective and acceptable treatment of a patient, NMA is concerned. Whenever the patient's right to individualized treatment is threatened, NMA is concerned.

Andrew Woods is a PFB victim. Shortly after he repeatedly shaved in order to comply with a no beard rule at the Safeway Store at which he worked as a supermarket clerk, he developed a case of progressive PFB. After a case history and an examination, his dermatologist, Dr. William T. Watkins, Jr.,[1] advised him to abstain from shaving indefinitely. Dr. Watkins believed that advice to be the most effective and acceptable manner in which to treat this individual's progressive PFB. Two other dermatologists, both of whom were recognized experts in PFB, examined Mr. Woods and testified that they concurred with Dr. Watkins' individualized plan of treatment.

At first, Safeway allowed Mr. Woods to follow his doctor's advice. Six months later, Safeway fired him because his doctor continued to advise him to abstain from shaving indefinitely and he decided to continue to follow his doctor's advice.

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*All of the facts reiterated herein are contained in the uncontradicted testimony of the experts at trial, the explicit findings of the lower court and the medical literature.

[1] Dr. William Watkins, Jr., a non-member of NMA, has been petitioner's dermatologist since he was a youngster with acne problems. Dr. Watkins' curriculum vitae, a trial exhibit, is attached as Appendix A.

Mr. Woods sued Safeway under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-*et. seq.*, alleging that his discharge was racially discriminatory. The lower court found that his discharge was discriminatory, but nonetheless *lawful* because Safeway had a legitimate business purpose for its no beard rule and because only Mr. Woods was fired.

PSEUDOFOLLICULITIS BARBAE

Pseudofolliculitis barbae (PFB) is a skin disease that is normally caused by shaving. Many Blacks have PFB; whereas few, if any, Whites have the disease.[2] The reason for this is quite simple. The structure that is affected by shaving and that thereby causes PFB is tightly curled facial hair. Many Blacks have a predisposition to tightly curled facial hair.[3]

Shaving can sharpen the tips of the facial hair. If one's facial hair is predisposed to curl in a loop -as is the hair of many, if not most, Blacks- the tip of the hair having been sharpened by shaving can curl around and penetrate the epidermis (the skin's surface). In effect, shaving for many Blacks transforms their facial hairs into curved barbs which

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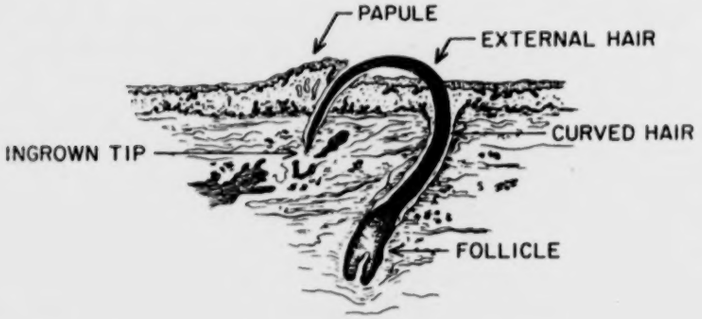
[2] The former Chief of Dermatology Service at Walter Reed Army Medical Center testified below that in his entire professional career as a military dermatologist from 1954 to 1974, he examined some 5,000 patients with PFB and each such patient was Black. He further testified that although he examined some 90,000 dermatology patients who were White, he never observed a White with PFB. He also testified that PFB "is an almost unique situation in the black race . . ."

[3] MOSCHELLA, PILLSBURY & HURLAY, DERMATOLOGY, 527 (W.B. Saunders Co., 1975) ("Strongly curved beard hairs are a racial trait of Negroes, singling them out as particular victims of the disease . . .") The follicles, that is, the chambers of tissue in which the hair grows, of Blacks have a predisposition to being curled; whereas the follicles of Whites have a predisposition to being straight.

can cut into the epidermis.[4] The entry of these hairs causes an inflammatory foreign body reaction which may appear as papules, pustules, nodules, abscesses, scars or disfiguring keloids. The schematic representation below shows a curled facial hair that has emerged from its normal follicle, curved around and re-entered the skin, thereby creating a *pseudofollicle* and a skin reaction.



Those studies that have been conducted indicate that a substantial number of Blacks have the disease.[5] These

[4] Facial hairs can be so tightly curled that they can penetrate the epidermis naturally, that is, without being sharpened by some external factor. Also, the follicle and hair may be so curved that the hair never emerges, but rather buries itself into the dermis. Craig, *Shaving: Relationship to Diseases of the Bearded Area of the Face*, 71 Arch. Derm. & Syph. 11-13 (1955). *Pseudofolliculitis* has been recorded among Black female patients. See Alexander, *Pseudofolliculitis Diathesis*, 109 Arch. Derm. 729 (1974).

[5] Pinkus, *Chronic Scarring Pseudofolliculitis of the Negro Beard*, 47 Arch. Derm. & Syph. 782 (1943) ("A peculiar condition involving the bearded part of the face and neck is present in a considerable percentage of Negro men but has attracted little attention in the medical literature.") The lower court found that the incidence of PFB among Black males ranged between 45% and 55%.

studies indicate that a not insubstantial portion of those Blacks afflicted by PFB are afflicted by severe PFB.[6]

TREATMENT OF *PSEUDOFOLLICULITIS BARBAE*

Historically, physicians have attempted to treat PFB with a multitude of palliatives. The treatment plan for the patient has depended in large part upon the severity of the condition and the patient's case history. In recent years grading systems have been devised to assist the physician in designing a treatment plan for a patient with PFB.[7] These grading systems recognize that some PFB victims can be effectively and acceptably treated without an indefinite abstinence from shaving and that for some patients nothing short of an indefinite abstinence from shaving is effective and acceptable treatment.[8] Sadly, in too many instances, medical knowledge of PFB has not developed to the point where an effective and acceptable solution other than indefinite abstinence from shaving is available. Consequently, all dermatologists recognize that for some PFB patients there

[6] Alexander & Delph, *Pseudofolliculitis Barbae in the Military: A Medical, Administrative and Social Problem*, 66 J. Nat'l. Med. Assoc. 459 (1974). The lower court made no finding as to the incidence of severe or so-called progressive cases.

[7] The two grading systems were devised by the two experts who testified for Mr. Woods. See TB MED 287, Department of the Army Technical Bulletin, *Pseudofolliculitis of the Beard*, August 14, 1973; Alexander & Delph, *Pseudofolliculitis Barbae in the Military: A Medical, Administrative and Social Problem, supra*, 66 J. Nat'l. Med. Assoc., at 460.

[8] Depending upon the severity of the patient's condition, the condition may be treatable without indefinite abstinence from shaving. Thus, for some patients, particularly those with mild cases of PFB, the use of depilatories has been effective although oftentimes quite irritating due to the chemical properties of the depilatory. Many patients

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is only one effective and acceptable treatment for the time being abstinence from shaving.[9] The reasons are that abstinence from shaving is a sure cure for all PFB victims and eliminates any further risk of disfigurement. If the hair continued to grow, rather than being cut, the external portion of the hair will form a gradually increasing loop. When the loop reaches a length of about 10 mm., it acts like the coil of a spring and exerts a force that pulls the embedded tip of hair out of its *pseudofollicle*. After the embedded hair has been dislodged, the skin reaction that it caused will normally heal over time. The schematic representation below shows the embedded tip of a facial hair springing out of the skin as the hair continues to grow rather than being cut in shaving.

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who use depilatories complain of the sulfuric odor and burning sensations from the sulfur. See Alexander & Delph, ***Pseudofolliculitis Barbae in the Military: A Medical, Administrative and Social Problem, supra***, 66 J. Nat'l. Med. Assoc., at 461. ("The second most satisfactory approach to managing PFB, according to these dermatologists, was the use of chemical depilatories; however the endorsement of their usage was considerably weaker, only 24% choosing it as the treatment of choice Chemical depilatories also carry a limited patient acceptability because of their foul odor and/or irritation, as well as their time-consuming nature.")

[9] The record reflects that this judgment is shared by respondent's trial expert, all three dermatologists who testified on behalf of petitioner.

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PERTINENT MEDICAL FACTS OF THIS CASE

Prior to being employed by respondent, petitioner had shaved infrequently. After he was hired by respondent, petitioner attempted to shave with a straight razor, an electric razor, and chemical depilatories. As a result, petitioner became afflicted by PFB that became progressively worse and worse. After attempting for 2½ months to shave despite extreme discomfort and continued "bumping", the petitioner visited his dermatologist.

When he first visited Dr. Watkins about this condition, Dr. Watkins diagnosed his condition to be severe.[10] That diagnosis from a respected local dermatologist was not questioned by the respondent prior to his discharge. Dr. Watkins' advice to petitioner, when he was first examined for this disease on January 30, 1974, was that he abstain from shaving for about eight weeks and that he then be re-examined.[11] When Dr. Watkins examined petitioner on April 9, 1974, he found that most of the embedded hairs had dislodged themselves and that the lesions on petitioner's face had begun to heal. Dr. Watkins advised petitioner to continue to abstain from shaving for another eight weeks. On June 10, 1974, Dr. Watkins again examined petitioner. He advised petitioner to continue to abstain from shaving

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continued from page 6

all branches of the military and all extant literature in the field.

[10] Dr. Watkins testified that when he first examined petitioner, he had "multiple incarcerated hairs that had grown out and re-entered the skin . . . a little bit of keloid activity as a result of the irritation, . . . [and] active pustules which had formed as a result of the foreign body reaction to the hairs incarcerated in the skin". He classified petitioner's case as severe.

[11] Dr. Watkins also prescribed tetracycline in an effort to reduce secondary infections from PFB.

because petitioner continued to be predisposed to severe manifestations of PFB.

Dr. Watkins testified that based upon his examinations of petitioner and petitioner's description of the methods that he had used to shave, he did not believe that at that time there was a more effective and acceptable treatment plan for this patient. In short, Dr. Watkins believed that the advise that he had given to his patient was that of a reasonably prudent physician specializing in dermatology and that he had fulfilled the dictates of his Hippocratic Oath.

Dr. A. Melvin Alexander, a member of NMA and the author of several papers on *pseudofolliculitis,*[12] testified that he had examined petitioner on a number of occasions and that "[a]t this time I would not consider any other therapy other than the abstinence from shaving".

In addition, Dr. George Skipworth, a renowned dermatologist and expert on PFB,[13] testified that he had examined petitioner and had questioned Dr. Watkins physician-to-

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[12] Alexander & Delph, *Pseudofolliculitis in the Military: A Medical, Administrative and Social Problem, supra*; Alexander, *Pseudofolliculitis Diathesis, supra*. Dr. Alexander's curriculum vitae, a trial exhibit, is attached as Appendix B.

[13] Dr. Skipworth, when he was Colonel Skipworth and Chief of the Dermatological Service at Walter Reed, prepared for the approval of the Surgeon General of the United States the U.S. Army's advice to its practicing physicians and physician's assistants regarding the treatment of PFB. That advice, TB MED 287, established that, if approved by a dermatologist, servicemen in progressive cases could be allowed to grow a beard. Usually it was believed a 1/4 inch beard would be sufficient to cure PFB after the embedded hairs have been dislodged. (Dr. Skipworth's curriculum vitae, a trial exhibit, is attached as Appendix C.)

physician regarding his treatment of petitioner. He was satisfied that petitioner's disorder was severe and that indefinite abstinence from shaving was the proper treatment.[14] Dr. Skipworth testified that at "this point in time, the only effective treatment that I can recommend, would be to grow a beard".

Dr. Murrell, a respected local dermatologist who testified for respondent,[15] agreed that for some PFB patients with severe cases, the only acceptable solution presently available is the growth of a beard and admitted that he has so advised some of his own patients. Dr. Murrell never examined petitioner.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The lower court's decision forces PFB victims like Mr. Woods to choose between the risk of *permanent* disfigurement and continued employment. Moreover, the opinion constitutes an unnecessary interference with the proper functioning of the physician-patient relationship. Given

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[14] "Well, I honestly think that this would actually, Mr. Woods' problem would fall in what I call progressive disease, and . . . it would be a recurrence of the process regardless of whatever modality he uses . . . Because of the number of lesions and the severity of the lesions. I think it is predictable that any time that you have more than a few bumps or papules, you can't use any type of razor. Any time you have anything beyond a papule or bump, you can't use the depilatory because it is too irritating . . ."

[15] Dr. Murrell's curriculum vitae, a trial exhibit, is attached as Appendix D.

the impact of the opinion below upon PFB victims and their advising physicians, the petition should be granted as it raises questions of general importance that should be resolved by this Court.

ARGUMENT

> "The dermatologist specializes in diseases which today, as in ancient times, lead to social isolation, guilt, and feelings of worthlessness."[16]

Skin diseases are often publicly quite visible. They arouse strong aesthetic feelings. The responses to skin diseases vary from staring curiosity to marked fearfulness, from mildly unpleasant feelings to disgust.[17] The patient is often fearful of disfigurement. In some instances, the patient's fear is well grounded. In those cases, the postponement of effective treatment not uncommonly leads to an irreversible dissemination of the disease, prolongs the discomfort, and aides and abets disfigurement.[18]

A physician is duty bound to "use treatment to help the sick according to . . . ability and judgment . . ."[19] The patient has a corresponding right to treatment from the physician. Needless to say, neither the physician's duty nor the patient's right is absolute. Nonetheless, the duty expressed in the Hippocratic Oath and the corresponding right to treatment

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[16] FITZPATRICK, DERMATOLOGY IN GENERAL MEDICINE, 9 (McGraw Hill Book Co., 1971).

[17] Id. at 6.

[18] Id. at 5.

[19] Hippocratic Oath.

are considered to be of paramount importance in a democratic society and intrusions are not to be tolerated unless necessary for some greater good.

In this case, Dr. Watkins properly diagnosed and treated Mr. Woods. In his judgment and that of two experts in this specific disease (PFB), any other plan of treatment at that time risked permanent disfigurement of his young unmarried patient. If Dr. Watkins had followed some other plan of treatment for this particular patient, he would have violated his solemn oath as a physician.

Faced with that advice, Mr. Woods had to decide whether or not to comply with Safeway's rule and risk permanent disfigurement. The choice was not an easy one as Mr. Woods had ambitions to work his way up in the company and become a manager someday. His decision to assert his right to treatment ought have been respected by the company, especially after Dr. Watkins explained to both the store manager and Employee Relations Manager for the entire Safeway division that the disease is caused by a physical characteristic of Blacks over which Mr. Woods had no effective control at that time.

We are at a loss to understand why the lower court felt that Safeway's interests in this matter were paramount to those of Mr. Woods. Safeway's interests were at worst only remotely threatened; whereas Mr. Woods' interests, especially in avoiding the risk of permanent disfigurement, were quite substantial. Safeway produced no evidence whatsoever to substantiate its fears; whereas Mr. Woods affirmatively demonstrated that there was no basis for the fear. Moreover, Safeway had more to fear from compliance than non-compliance as Safeway admitted that when Mr. Woods was in compliance with its rule, his face was so unattractive that it might repel customers.

CONCLUSION

The lower court's decision ratifies and condones Safeway's treatment of Mr. Woods and constitutes a grave intrusion upon the physician-patient relationship. If the decision is not set aside, patients, in circumstances like that of Mr. Woods, will be forced to choose between effective treatment for the disease and continued employment. Such a result is intrinsically unfair and when one adds the dimension of race, it is racially discriminatory.

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

LAWRENCE S. BLUMBERG, ESQ.*

One Rockefeller Plaza
Suite 1915
New York, New York 10020
(212) 246-6950

Counsel for National Medical Association, Amicus Curiae

Dated: December 14, 1978

* Counsel gratefully acknowledges the assistance of Dr. Jesse B. Barber, President, National Medical Association.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 1978, three copies of the foregoing Motion of National Medical Association for Leave to File Brief As *Amicus Curiae* and Brief for the National Medical Association, *Amicus Curiae*, in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit were sent by first class mail, postage prepaid to James Patrick McElligott, Jr., of the firm of McGuire, Woods and Battle, 1400 Ross Building, Richmond, Virginia 23219.

/s/ Lawrence S. Blumberg, Esq.

Appendices

APPENDIX A

CURRICULUM VITAE

WILLIAM T. WATKINS, JR. M.D.

Office: 321 Main Street, Newport News, Virginia 23601
(703) 596-8183

Born: Newport News, Virginia
November 7, 1922

Family: Wife – Mary C.
Children – Margaret, 22
William T., III, 28

Education: Newport New Public Schools, 1927 - 1939
Graduated Newport News High School,
June 8, 1939 (Class Valedictorian)

Duke University, Durham, N.C. 1939 - 1942
Undergraduate (second in class at end of Junior year on entry into medical school)

Duke University School of Medicine
Durham, N.C. July, 1942 - June, 1945
M.D. degree – June 23, 1945

Post Graduate Education:

Intern (Rotating) U.S. Naval Hospital
Portsmouth, Virginia - June 1945 - July 1946

Assistant Resident–Resident, Dermatology and Syphilology, Duke Hospital, Durham, N.C. March 1948 - July 1951. Instruction Dermatology, Duke University School of Medicine, 1950 - 1951.

Academic Honors:

Phi Beta Kappa – Duke University 1942

Alpha Omega Alpha – Duke University School of Medicine – 1945

Service in Armed Forces:

Apprentice Seaman V-12 – Duke Medical School, 1943 - 1945

Lt. (j.g.) MCUSNR June 1945 - March 1948 (Resigned Commission USNR 1955)

Hospital Staff Appointments: (Staff Dermatologist)

Buxton Hospital-Mary Immaculate Hospital Newport News, Virginia 1952 - 1964 (Staff President 1955)

Dixie Hospital, Hampton, Virginia 1952 - 1964

Riverside Hospital, Newport News, Virginia 1952 - Present

Teaching Appointments: (Non-Medical School)

Consultant McDonald Army Hospital
Ft. Eustis, Virginia 1952 - present
Dermatology and Syphilology

Teaching Staff Riverside Hospital
Newport News, Virginia 1952 - present
Includes rotation of Family Practice Residents on elective (1 month per man) basis in my private practice office, Newport News, Virginia

Medical Licensure:

Virginia, 1951
North Carolina, 1948
Florida, 1950

National Board of Medical Examiners Completed Part III 1946

Board Certification:

American Board Dermatology and Syphilology 1952

Medical Societies:

American Medical Association
Medical Society of Virginia
Southern Medical Association
News Medical Society

Fellow American Academy of Dermatological Society, Virginia
Dermatological Society (President 1973)

Tidewater Dermatological Society (Virginia)
Peninsula (Virginia) Academy of Medicine
President, 1955

Professional Practice – Dermatology and Syphilology:

Private Practice, Newport News, Virginia
January 2, 1952 to present (Associate since 1961 with Dr. B. Voss Neal)
Drs. Watkins and Neal, Incorporated
321 Main Street, Newport News, Va. 23601

Civil Service:

School Board (Vice Chairman),
City of Newport News, Virginia 1958 - 1970

Commissioner (representing Newport News)
Peninsular Airport Commission
Patrick Henry International Airport
Newport News, Virginia 23606
1974 - present

Past Board Member:
American Cancer Society
Virginia Peninsula YMCA
Virginia Peninsula

Peninsula Vocational Technical School
Organizing Committee
Past Board Chairman

Hobbies:

Boating, Fishing, Photography, Scale model railroading

Social Organizations:

James River Country Club, Newport News, Virginia
Hampton Roads German Club
U.S. Power Squadron (Educational & Social)

Publications:

Grimson, Keith S., Lyons, C. Keith, Watkins, W.T. and Callaway, J. Lamar: Successful Treatment of Hyperhidrosis Using Banthine. *The Journal of the American Medical Association.* 143: 1331- 1332 (August) 1950

Watkins, William T., Jr.: The Management of Stasis Dermatitis and Stasis Ulcer. *North Carolina Medical Journal.* 12: 499-501 (October) 1951

Callaway, J. Lamar, Watkins, W. T., Jr., Crane, G. W. and Dees, Susan C.: Clinical Evaluation of 1-B-1 diethylaminoethoxy 3-N Butyliso-quinoline as an antiprurite agent. *North Carolina Medical Journal.* 12: No. 11 546-548 (November) 1951

Watkins, W. T. Jr.: Treatment of Itching with an oral Antipruritic Agent, Scientific Exhibit annual meeting of the Medical Society of Virginia, Richmond, Virginia (October 12-15, 1958)

Discussion on R. C. V. Robinson and Harry M. Robinson, Jr., Control of Emotional Tension in Dermatoses. *Southern Medical Journal* (February 1958)

APPENDIX B

CURRICULUM VITAE

A. MELVIN ALEXANDER, M.D.

Born: February 4, 1943 – Cleveland, Ohio

Nationality: Afro-American (Native U.S. Citizen)

Wife: Leslie

Daughters: Hollie (7) and Allison (6)

1961-1964 – Hillsdale College, Hillsdale, Michigan, B.S.*

1964-1968 – Howard University College of Medicine, Washington, D.C., M.D.

1968-1969 – Internship (straight medicine), Veterans Administration Hospital, Washington, D.C.

1969-1972 – Residency, Division of Dermatology, Freedmen's Hospital, Washington, D.C.

1971-1972 – Fellowship, Division of Infectious Diseases, Freedmen's Hospital, Washington, D.C. (included a three-month period of research in Jamaica)

1972-1974 – Chief, Dermatology Service, U.S. Army Hospital, Okinawa, Japan

---

*Degree Conferred June 1965, after completion of first year of Medical School.

1974-Present – Physician/Consultant, Community Group Health Foundation, Inc., Washington, D.C.

1975-Present–Private Practitioner of Dermatology at 1015 Spring Street, Suite 206, Silver Spring, Md.

University Affiliation:

Clinical Instructor in Department of Dermatology, Howard University, Dermatology Consultant, Department of Family Practice, Howard University, Washington, D.C.

Societies: American Medical Association
International Society of Tropical Dermatology
District of Columbia Medical Society

Boards (Specialty):

Eligible American Board of Dermatology

State Licenses:

Maryland & District of Columbia

Special Recognition and Honors:

1965-1966 – Tutor Academic Reinforcement Program, Howard University College of Medicine.

1966 – Member, Student Multidisciplinary Research Group, Howard Univesity, College of Medicine.

1968 – Upjohn Award for Excellence in Research; Third Award in Obstetrics and Gynecology, Howard University, College of Medicine; Certificate of Merit, Department of Pharmacology, Howard University, College of Medicine; **First Prize**, Interns and Residents Competition, Association of Former Interns and Residents of Freedmen's Hospital, Washington, D.C.

Research Activities:

1965-1968 – Research Assistant, Department of Pharmacology, Howard University, College of Medicine.

1971-1972 – Fellowship, Division of Infectious Diseases, Freedmen's Hospital; major interests TROPICAL ULCERS (Research conducted at the University of the West Indies, Kingston, Jamaica) and TINEA VERSICOLOR.

1973-1974 – U.S. Army Medical Center, Okinawa, Japan; major interest – PSEUDOFOLLICULITIS BARBAE.

Publications (Scientific):

Alexander, A.M. and Koh, J.K.: Tinea Versicolor Confined to the Face and Neck. *Cutis*, 9:387-388, 1972.

Alexander, A.M. and Koh, J.K.: Granuloma Pyogencium (Pyogenic Granuloma) Causing Severe Anemia. *Arch. Derm.*, 106: 128, 1972.

Alexander, A.M. and Koh, J.K.: Localized Cutaneous Amyloidosis Is Suspected of Having Relationship to Systemic Sclerosis. *Dermatology in Practice*, "The Three Minuters" Gross and Microscopic Dermatology Reports," Vol. 1, No. 4, 1972.

Alexander, A.M.: Pseudofolliculitis Diathesis; *Arch. Derm.*, 109: 729-30, 1974.

Alexander, A.M. and Delph, W.I.: Pseudofolliculitis in the Military: A Medical, Administrative and Social Problem. *J. Nat'l Med. Assn.*, Vol. 66, No. 6, 1974.

Presentations (Scientific):

1967 – "Effects of Tyramine on the Intact Adrenal Gland," Student Research Symposium, University of Texas, Galveston, Texas.

1970 – "Idiopathic Guttate Hypomelanosis, Dermatology Section of the National Medical Association, Atlanta, Georgia.

1971 – Case Presentation – Klippel-Trenaunay-Weber Syndrome, Atlantic Dermatological Society Meeting, Washington, D.C.

1971 – "Pyogenic Granuloma Causing Severe Anemia," Dermatology Section of the National Medical Association, Philadelphia, Pennsylvania.

1971 – "Amyloidosis Cutis and Scleroderma," American Academy of Dermatology, Chicago, Illinois.

1972 – "Cultivation, in Vitro and in Vivo Studies of Malassezia furfur," **First Prize**, Interns and Residents Competition, Association of Former Interns and Residents of Freedmen's Hospital, Washington, D.C.

1973 – "Pseudofolliculitis Barbae in the Military: A Medical, Administrative and Social Problem," Dermatology Section of the National Medical Association, New York, New York.

Other Publications and Presentations:

"Pseudofolliculitis in the Military", JORO Radio, Okinawa, Japan, April 1973.

"Bias Alleged in Handling Pseudofolliculitis Barbae", *Skin & Allergy News*, Vol. 4, No. 11, November, 1973.

"A Hairy Problem", (Contributor), *Encore* magazine, February, 1974.

"Military Men With Pseudofolliculitis Barbae Condition Are Still Harassed", *Skin & Allergy News*, Vol. 5, No. 10, October, 1974.

"Pseudofollicultis in the Military", WHUR Radio, Washington, D.C., October, 1974.

"Pseudofolliculitis in the Military", National Public Radio, Washington, D.C., October, 1974.

"Pseudofolliculitis in the Military", The Pentagon, Arlington, Virginia, November, 1974.

APPENDIX C

CURRICULUM VITAE

GEORGE B. SKIPWORTH, M.D.

Date of Birth:	January 31, 1927
Place of Birth:	Columbus, Georgia
Social Security No.:	257-20-9919
Dependents:	Wife – Eileen Children – James D. Heather E. William S.
Military Status:	Colonel, Medical Corps, Retired (October 1974)
Graduate Education:	University of Georgia, Athens, Georgia 1944-1945
	Duke University, 1946-1948 (A.B.)
Medical Education:	Duke University School of Medicine 1950-1954 (M.D.)
Internship:	Tripler Army Medical Center Oahu, Hawaii, 1954-1955
Residency:	Letterman Army Medical Center San Francisco, California, 1956-1959
Military:	U.S. Marine Corps January 1945–August 1946

Chief, Dermatology Service, Martin Army Hospital, Fort Benning, Georgia 1960-1963

Chief, Dermatology Service
Tripler Army Medical Center
Oahu, Hawaii
1963-1966

Chief, Dermatology Service
William Beaumont General Hospital
El Paso, Texas
1966-1969

Assistant Chief, Dermatology Service
Brooke Army Medical Center
San Antonio, Texas
1969-1971

Chief, Dermatology Service
Brooke Army Medical Center
San Antonio, Texas
1971-1972

Chief, Dermatology Service
Walter Reed Army Medical Center
Washington, D.C.
1972-1974

Consultant in Dermatology
Office of The Surgeon General
April 1972-October 1974

Certifications: American Board of Dermatology October 15, 1961

Licensed, State of Georgia
July 1956–No. 7894

Professional Societies:

1) Member, American Medical Association, 1954
2) Member, The Association of Military Dermatologists, 1957
3) Fellow, American Academy of Dermatology, 1961
4) Member, International Congress of Dermatology, 1962-1972
5) Member, Pacific Dermatologic Association, 1968
6) Member, Honolulu Dermatological Society, 1963-1968
7) Associate, American College of Physicians, 1965
8) Member, Dermatology Foundation 1966
9) Fellow, American College of Physicians, Boston, 1968
10) Member, Association of Professors of Dermatology, 1969
11) San Antonio (Texas) Dermatological Society, 1969-1972
12) Member, American Venereal Disease Association, 1971
13) The Washington, D.C. Dermatological Society, 1972-1974
14) President, Association of Military Dermatologists, 1972-1973
15) Member, Association of Military Surgeons of the U.S., 1973

16) Member, Foundation for International Dermatologic Education, 1973
17) Member, Muscogee County Medical Society, 1974
18) Member, Medical Association of Georgia, 1974
19) Member, Southern Medical Association, 1974
20) Associate, Atlanta Dermatological Association, 1975

Publications:

1) "Treatment of Disseminated Coccidioidomycosis with Amphotericin B," *Arch. Derm.* 78:97-100, July 1958 (Co-author).
2) Proceedings-San Francisco Dermatological Society: a. Cases for Diagnosis (3), *Arch. Derm.* 77: 480, April, 1958.
3) "Zirconium Granulomas of the Glabrous Skin Following Treatment of Rhus Dermatitis," *Arch. Derm.* 80:273-276, September, 1959 (Co-author).
4) "Coccidioidal Granulomas of Skin and Conjunctiva Treated with Intravenous Amphotericin B," *Arch. Derm.* 82:605-608, October 1960 (Co-author.)
5) "Longitudinal Grooving of Nails Due to Synovial Cysts," *Arch. Derm.* 89:364-366, March 1964, (Co-author).
6) "Valium-Like Chloroquine–Dangerous Drugs for the Psoriatic," *Schoch Letter*, March, 1965.

7) "A Dermabrasion Bridge," *Bulletin of the Association of Military Dermatologists*, 15:28-29, August 1966, (Co-author).
8) "Boric Acid Intoxication from 'Medicated Talcum Powder,' " *Arch. Derm.* 95:73-86, January 1967, (Co-author).
9) "Bilateral Mondor's Disease," *Arch. Derm.* 95:95-97, January 1967, (Co-author).
10) Book Review: **Practical Dermatology**, Lewis & Wheeler, *Arch. Int. Med.* 119:654, January, 1967.
11) Book Review: **The Skin**, Arthur C. Allen, *Arch. Int. Med.* 121:203 February, 1968.
12) "Fabry's Disease," JAMA 208: 1190, 19 May 1968 (Co-author).
13) "Hyperkeratosis Penetrans," *Arch. Derm.* 98:270, September 1968 (Co-author).
14) "Hyperkeratosis Penetrans," (corres.) *Arch Derm.* 98:684, December 1968.
15) "Toxic Epidermal Necrolysis," CUTIS 6:307-312, March 1970.
16) "Pearls from Previous Stations," *Bulletin of The Association of Military Dermatologists*, 18:23-24, September 1970.
17) "Incidence of Skin Cancer," (corres.) *Arch. Derm.* 102:561, November 1970.

18) "Report on Military Dermatology Assistants," *Bulletin of the Association of Military Dermatologists*, 20:20-23, June 1972.
19) "Acquired Progressive Kinking of the Hair," *Bulletin of the Association of Military Dermatologists*, 20:35-40, October 1972, (Co-author).
20) "Report-Army Teaching Chiefs' Conference," 1972) *Bulletin of the Association of Military Dermatologists*, 21:31-32, October, 1973.
21) "Effects of Topical Betamethasone -M. Benzoate on Adrenocortical Function, *Bulletin of Military Dermatologists* (In Press) (Co-author).
22) "Report-Army Teaching Chiefs' Conference," 1973) *Bulletin of The Association of Military Dermatologists* (In Press).
23) "Pseudofolliculitis of the Beard," *Department of the Army Technical Bulletin*, TB Med, 287:1-7, 15 August 1973.
24) "Ginko Tree Dermatitis, Stomatitis and Proctitis," JAMA, 231:1162-1163, 1975.

Discussions:

1) Discussion of paper "Pits of Palmar Creases," submitted for publication in *Southern Medical Journal*, Edgar B. Smith and Robert L. Jetton (Atlanta) 10 November 1969.

2) Presentation of paper "Toxic Epidermal Necrolysis Short Hair-Sunburn Syndrome," Military Dermatology Symposium, Academy of Dermatology Annual Meeting (Chicago) 8 December 1970.
3) Discussion of paper "Toxic Epidermal Necrolysis and Disseminated Intravascular Coagulation," Texas Dermatological Society (Houston) 8 May 1971.
4) Moderator, Clinical Section, Texas Dermatological Society Meeting, 14 May 1972.

Committees:

1) El Paso-Juarez Civilian-Military Committee for VD Control (Military Representative) 1966-1969.
2) Academy Committee on Military Affairs (Academy of Dermatology) 1971-1974.
3) Military Dermatology Advisory Committee to the National Program for Dermatology, 1971-1974.

Awards:

1) Good Conduct Medal (USMC)
2) World War II Victory Medal
3) American Campaign Medal
4) Armed Forces Reserve Medal
5) National Defense Service Medal–1st Oak Leaf Cluster
6) Army Commendation–1st Oak Leaf Cluster
7) Legion of Merit–1st Oak Leaf Cluster

8) Awarded the Professional "A" Prefix in Dermatology by the U.S. Surgeon General of the Army, 17 December 1973

Appointments:

Clinical Associate Professor (Dermatology), University of Texas Medical School at San Antonio, Texas (1971-1972).

Associate Clinical Professor (Department of Dermatology, George Washington University Medical Center, Washington, D.C. (1972-1974).

Clinical Associate Professor (Dermatology), Howard University, Washington, D.C. (1972-1974)

Clinical Associate Professor (Dermatology), Georgetown University School of Medicine, Washington, D.C. (1972-1974)

Regional Proctor, Part I Board Examination, The American Board of Dermatology, Inc., Washington, D.C. area, 1973, 1974.

Associate Staff, The Medical Center (Columbus, Georgia), 1974.

Associate Staff, St. Francis Hospital (Columbus, Georgia), 1974.

Consultant (Dermatology), Martin Army Hospital. Fort Benning, Georgia, 1975 (Pending Confirmation).

Clinical Assistant Professor (Dermatology), Emory University, Atlanta, Georgia, 1975.

APPENDIX D

CURRICULUM VITAE

DR. THOMAS W. MURRELL, JR.

1940:	Graduated from Department of Medicine, University of Virginia with degree of Doctor of Medicine
1940-1941:	New York Post Graduate Hospital – Internal Medicine
1941-1942:	New York Skin and Cancer Hospital– Dermatology
1942-1945:	Dermatologist in United States Army (Rank of Major)
1945-present:	In private practice, City of Richmond
1945-present:	Clinical Professor of Dermatology, Health Science Division, Virginia Commonwealth University (MCV); on teaching staff for 31 years
1948:	Certified as diplomate of the American Board of Dermatology
1957:	President of Richmond Academy of Medicine
1966-present:	Lectures annually at American Academy of Dermatology
1967:	President of Medical Society of Virginia

1970-present: Council of National Program of Dermatology

1971-present: Secretary of American Dermatological Association

1975-present: Chairman of Section on Dermatology of Southern Medical Association

Supreme Court, U.S.
FILED
DEC 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-901

MR. ANDREW WOODS, Petitioner,

v.

SAFEWAY STORES, INC., Respondent.

BRIEF FOR NATIONAL BLACK VETERANS ORGANIZATION, AMICUS CURIAE

JOHN W. GARLAND
HERBERT SEMMEL

CENTER FOR LAW AND
SOCIAL POLICY
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

ATTORNEYS FOR PETITIONER

December 18, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-901

MR. ANDREW WOODS, Petitioner

v.

SAFEWAY STORES, INC., Respondent.

MOTION OF NATIONAL BLACK VETERANS ORGANIZATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Black Veterans Organization (NBVO) hereby moves, pursuant to Rule 42 of this Court, for leave to file

the attached brief as amicus curiae, in support of the petition for a writ of certiorari. Petitioner has consented to the filing of this brief, but respondent has denied such consent.

The National Black Veterans Organization is a non-profit association organized in 1976 to promote the common interests of Black veterans and the general public in the development and implementation of non-discriminatory employment practices within the Armed Forces of the United States and the elimination of artificial barriers to the employment of Black veterans. Many Black veterans and servicemen have pseudofolliculitis barbae.

NBVO's interest in this particular case is two-fold. First, the lower court's decision jeopardizes the

continued employment of many Black veterans. Second, the decision encourages the Armed Forces to retreat from its recent change in the treatment of Black servicemen with pseudofolliculitis barbae.

If the lower court's decision is not reversed, Black veterans afflicted by PFB may be required to disobey their doctor's advice or forfeit their livelihoods and the Armed Forces may reverse its position and refuse to allow military dermatologists to prescribe beard therapy for PFB. The lower court's interpretation of the "business necessity" doctrine in this case affects not only the individual in this case, but many Black servicemen and veterans.

The petition necessarily concentrates on the specific facts in this case. NBVO's brief will elucidate its perception of the lower court's misplaced reliance on grooming cases for its rationale that a legitimate business purpose permits racial discrimination. NBVO's brief will also discuss the social policy implications of this case.

We believe that our perspective will assist the Court in reaching a decision on the petition. Accordingly, NBVO respectfully requests that the Court permit our brief as amicus curiae to be filed and considered.

Respectfully submitted,

John W. Garland

John W. Garland
Herbert Semmel

CENTER FOR LAW AND
SOCIAL POLICY
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

ATTORNEYS FOR NATIONAL
BLACK VETERANS ORGANIZATION,
Amicus Curiae

December 18, 1978

Garrett L. Wong*

* A third year student at the University of Pennsylvania Law School

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Other Authorities:

A.M. Alexander, W.I. Delph, "Pseudofoliculitis Barbae in the Military: A Medical, Administrative and Social Problem," Journal of the National Medical Association, 66 J.N.M.A. 459 (1974)..... 22

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-901

MR. ANDREW WOODS, Petitioner,

v.

SAFEWAY STORES, INC., Respondent.

BRIEF FOR NATIONAL BLACK VETERANS ORGANIZATION, AMICUS CURIAE

INTRODUCTION

The interest of the National Black Veterans Organization (NBVO) has been stated in the foregoing motion, and

therefore will not be repeated here.

SUMMARY OF ARGUMENT

This case involves much more than the individual petitioner, Mr. Andrew Woods, and the individual respondent, Safeway Stores, Inc. This case is of singular importance because it involves a substantial departure from this Court's holding in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

The national policy of equal employment opportunity, as embodied in Title VII, mandates that race not be a factor in employment decisions. This Court has interpreted Title VII to permit an employment practice or policy which operates in a discriminatory manner to stand if it is shown to be a business necessity. Griggs v. Duke Power Co., supra, at 431. In Griggs, this Court stated that "...The touchstone is business necessity. If an employment practice cannot be shown to be related to job performance, the practice is prohibited", 401 U.S. at 431, and that "what is referred by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of race or other impermissible classification."

In the case now before this Court, the District Court and Court of Appeals for the Fourth Circuit have held that when an employer has a grooming regulation that operates invidiously to exclude a Black man, that rule and its discriminatory effect are permissible, because the employer has a reasonable

"business purpose" for the regulation. As a result of this decision, the Griggs "business necessity" rule does not apply in the Fourth Circuit when the employer has a legitimate business purpose for a racially discriminatory regulation. The elements of the "business necessity" doctrine are seriously diluted by the court below since Safeway failed to produce any evidence that its refusal to exempt Mr. Woods from its grooming regulation was necessary for the safe and efficient operation of its business.

The National Black Veterans Organization believes that this Court should grant the writ requested in order to precisely enunciate and reaffirm the "business necessity" test. The lower court's reaction to Dr. Watkins' treatment of this medical condition in this

case threatens the employability of PFB victims and the economic stability of their families. Reversal of the lower court would encourage fair and humane treatment of PFB victims.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN GRIGGS v. DUKE POWER CO., SUPRA AND TRANSWORLD AIRLINES, INC. v. HARDISON, 432 U.S. 63 (1977) AND PERMITS AN EMPLOYER TO DISCRIMINATE ON THE BASIS OF RACE WITHOUT DEMONSTRATING THAT ITS PRACTICE IS MANDATED BY "BUSINESS NECESSITY."

A. Title VII Has Been Interpreted To Prohibit Artificial, Arbitrary, And Unnecessary Barriers To Employment When Such Barriers Operate Invidiously To Discriminate On The Basis Of Race.

Title VII on its face prohibits discrimination in employment based on race, color, religion, sex or national origin. However, this Court in Griggs v. Duke

Power Co., supra, held that an employment practice that operates in a discriminatory manner would be allowed to stand only if it is shown to be related to job performance and is necessary. The "business necessity" standard was developed to ascertain in what extremely limited situations a discriminatory practice would be permitted to stand. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Lower federal courts, in interpreting this Court's decisions in Griggs and Albemarle regarding what is a "business necessity", have stated "...Necessity connotes an irresistible demand", United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971); a racially discriminatory seniority system must be tested by compelling business necessity

and not the less strict standard of business purpose, U.S. v. H.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); sex bias is permissible only when the "essence of business operation" would be undermined, Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971); high degree of economic and human risks justifies policy with adverse racial impact, Spurlock v. United Airlines, Inc., 475 F.2d 215 (10th Cir. 1972). These cases demonstrate that the business necessity doctrine normally involves consideration of safety or other issues going to the heart of the operation of the business.

The trial court and appellate court in the instant case correctly found that appellee's no-beard policy did act to discriminate against appellant because

of his race. They also correctly concluded that Title VII has been interpreted to prohibit employment practices that may be neutral on their face but have a disparate impact on members of a distinct racial group if the practice cannot be justified by a proven business necessity, citing, Robinson v. Lorillard, 444 F.2d 791 (4th Cir. 1971).

B. The Court Below Committed Serious Error When It Failed To Apply The Business Necessity Test To Respondent's Treatment Of Petitioner And Condoned The Racially Discriminatory Practice.

The lower court committed serious error by holding that the discriminatory impact of the no-beard regulation did not violate Title VII. In reaching its conclusion, the trial court cited a number of cases that affirmed the right

of an employer to maintain grooming standards.[1/]

It should be noted that both Griggs and Robinson directed their attention to racial discrimination. By contrast, in all the grooming code decisions cited by the trial court, except one, individuals alleged that they were the victims of unlawful sex discrimination. The business necessity doctrine articulated in Robinson was never applied to any of the cases cited above. However, Griggs was used by several circuit courts to

1/ Brown v. D.C. Transit System, Inc., 523 F.2d 725 (D.C. Cir. 1975); Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1972); Boyce v. Safeway Stores, Inc., 351 F.Supp. 402 (D.D.C. 1972); Baker v. California Land Title Co., 349 F.Supp. 235 (C.D. Calif. 1972).

assert the right of an employer to maintain grooming standards. 2/

These opinions cited to the following Griggs passage:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 3/

2/ Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973).

3/ Id. citing Griggs, 401 U.S. 424, 429-430, 91 S.Ct. 849, 853.

These cases ignored Griggs' analysis of the business necessity doctrine and used much of the above passage to argue that 1) grooming requirements which have no significant effect upon the employment opportunity afforded one sex in favor of the other was outside the prescription of the Civil Rights Act; and 2) distinctions in employment practices between men and women on the basis of something other than immutable characteristics or legally protected rights do not inhibit employment opportunities in violation of the Civil Rights Act.

In addition, the courts uniformly said they would not consider the "bona fide occupational qualification," pursuant to 42 U.S.C. §2000e-2(e)(1) because dress and grooming policies did not

unlawfully discriminate on the basis of sex.[4/] The Boyce and Fagan cases have set the tone for the grooming cases. The cases, dealing primarily with alleged sex discrimination, have presented their own "business analysis" standard. In Boyce, for example, Judge Gesell found that "no substantive issue [was] presented;" that there were grooming standards for female and male employees.[5/] The concern of most of these decisions went to whether there were distinct employment opportunity disadvantages for one sex due to outmoded and unjustifiable sex stereotypes.[6/]

4/ See, e.g., Willingham, supra, 507 F.2d at 1088, Baker, supra, 507 F.2d at 898; Fagan, supra, 481 F.2d at 1123-1126; Dodge, supra, 448 F.2d at 1335.

5/ 351 F.Supp. 402

6/ Id.

In most decisions, the courts felt that a grooming code did not conform to this analysis. The courts' feelings are best summarized in the following passage:

> "Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance. Good grooming regulations reflect a company's policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility. Congress has said that no exercise of that responsibility may result in discriminatory deprivation of equal opportunity because of immutable race, national origin, color, or sex classification." 7/

7/ Fagan, supra, 431 F.2d at 1124.

Unlike the grooming cases discussed above, the case at bar does involve an issue of immutability. For example, in Baker, the Court of Appeals concluded that this Court's decision in Griggs....

> "was not talking in terms of hair styles or modes of dress over which the job applicant has complete control. The Court was addressing itself to characteristics which the applicant, otherwise qualified had no power to alter." 507 F.2d 895, at 897.

The common theme in all of the grooming cases cited by the court in Woods is that (1) hiring policies that distinguish between men and women on a ground related to choice are permissible; (2) Title VII does not prohibit an employer from promulgating rules of employment where the direct economic effect upon the employee is nominal or non-existent; (3) Title VII proscribes employer rules and

regulations that limit or prevent employment of individuals because of an immutable characteristic. Mr. Woods has an immutable characteristic that cannot be changed subject to what courts feel is personal preference or the whim of fashion. Thus, his case falls outside the category of grooming cases which have alleged sex discrimination.

Mr. Woods' situation poses a new category of grooming cases falling under the category of race discrimination because of an immutable condition that the trial court has recognized as being peculiar to the black race.[8/] The trial transcript clearly demonstrates that appellant did try to conform to the rules

8/ Woods Trial Court opinion, 12.

of his employer. Only after his physician advised of the nature and extent of his condition and the only curative course of treatment presently known to medical science, did Mr. Woods have any choice in the matter; between pain, disfigurement, and a more unsightly appearance, and a job as a stock clerk at a Safeway store. Hence his decision was based on a medical necessity and not whim or caprice.

Although the trial court acknowledged that "the statute has been interpreted to prohibit even racially neutral employment practices if the same has a significantly disparate impact on members of a distinct racial group and if they cannot be justified by proven business necessity,"[9/] it did not invoke the

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9/ Id. 13

standard articulated in Robinson. Rather, the court simply allowed the assertion that the "image of cleanliness was necessary to attract and retain customers" and the proposition that the defendant exercised "sound business judgment" in concluding that a "no-beard" rule was a necessary part of its grooming code. Without substantiation, the trial court concluded that this was a legitimate business decision "reflecting on the local clientele." Little import was given to the fact that other Safeway divisions or Safeway stores within the area of the store itself do not require such a grooming restriction. The argument the District Court as it was affirmed by the Court of Appeals flies in the very face of the concerns of Congress as expressed in the Griggs and

Robinson opinions. Moreover, in Diaz v. Pan American, supra,[10/] the 5th Circuit held that mere customer preference would not justify continuation of a discriminatory hiring policy in favor of women.

It is clear to Amicus that the court below has seriously cut into the "business necessity" standard that is to be used to justify a racially discriminatory business practice. By merely citing Robinson as the basis for its decision, but relying more on the less stringent analyses of the grooming cases, the court below has permitted form to triumph over essence; that is a reasonable or legitimate grooming regulation to supersede Title VII's prohibition against employment practice barriers that operate to exclude and discriminate based on race.

10/ 442 F.2d 385 (5th Cir. 1971)

C. The Court Below Incorrectly Justified The Discriminatory Regulation Because The Appellant Was The Only Black Employee Discharged.

The District Court judge stated that the impact of discharging one man with PFB is negligible since it affects only one Black. On the other hand, it is highly improbable that one individual can minimize the store's ability to sell its products. The fact that only one individual is affected by this employment practice does not negate the fact that this practice is illegal. That reasoning of the court below is inconsistent with this Court's statements in McDonald v. Santa Fe Trail Transp. Co., 423 U.S. 9231 (1976), that Title VII applies to isolated cases of discrimination as

vigorously as in class action cases.

II. PFB IS AN IMMUTABLE CHARACTERISTIC PECULIAR TO MEMBERS OF THE BLACK RACE AND THEREFORE, ANY DISCRIMINATION BASED ON THE ONLY KNOWN EFFECTIVE TREATMENT FOR SEVERE CASES OF PFB, WHICH IS THE GROWING OF A BEARD, DESERVES PROTECTION.

A. PFB is a Very Common Skin Condition Among Black Men Who Shave Regularly

PFB is a skin condition that is caused by the tips of curly or kinky facial hairs penetrating into the skin and causing an inflammatory reaction. The disorder appears almost exclusively in Black men because of the fact that Blacks have curved hair follicles, unlike Whites, whose hair follicles are straight. PFB is a purely mechanical condition, not one caused by a particular chemical or hormonal imbalance, but rather by the curved hair follicles which after shaving cause the already curly

hair to curve back into contact with the skin surface, pierce and reenter the skin; creating a pseudofollicle. The initial flammatory reaction or lesion produced at the site of the reentry of the hair are called papules or razor bumps. The reaction is similar to that caused by a foreign body (splinter) entering the skin. Unless the disorder is properly treated, scarring and permanent disfigurement can be caused by PFB, depending on the severity of the condition. In all cases, a cessation of shaving will cure and prevent recurrence of the disorder; whereas regular shaving will exacerbate the condition. In some cases, the hair follicles curve into the facial tissue without even growing above the skin line.

Shaving abstenance cures and prevents the disorder because when the tip of an

embedded hair penetrates to a certain depth, the facial tissues resist and prevent further penetration. If the beard is not shaved and continued to grow, the external portion of the hair forms an increasing loop (one end pseudofollicle, the other end the true follicle) which acts like a spring that exerts force and pulls the embedded tip of the hair out of the skin. Once the embedded hairs have been dislodged, the papules or razor bumps begin to heal.

Several medical studies have concluded that 45%-80%[11/] of all Black men, usually young males, suffer from PFB. Many cases of PBF are not so severe as

11/ A.M. Alexander, M.D. and W.I. Delph, M.D., Pseudofolliculitis in the Military, Journal of the National Medical Association, Vol. 66, No. 6, page 459, November 19, 1974.

to require shaving abstinence for treatment. However, a significant number are diagnosed as moderate to severe. Even in those instances where PFB has not been diagnosed as moderate to severe, if a victim is prone to keloids, (which is excessive scarring) simple papules or razor bumps can lead to the development of disfiguring scars. Thus, in those instances where a sufferer has mild PFB but is prone to keloidal scarring, an effective treatment to prevent such scarring is the growth of a beard.

B. Unless Certiorari is Granted Bad Social Policy Regarding PFB Will Be Instituted

The wearing of a beard causes different responses in people and institutions. Many attitudes are the result of personal preference, social

mores or as in this case, regulations developed by an employer. The impact of attitudes and policies on the individual with a beard can range from admiration to complete rejection or termination from employment. In recognizing PFB, the Army, Air Force and Marine Corps have promulgated regulations[12/] for the administrative and medical management of the condition. In all cases, these branches of the military have as the rule that all individuals must be clean shaven and permits the wearing of a beard only if there is a confirmed diagnosis of PFB. It should be noted that the Navy instituted a rule that permits any member to wear a beard if they so choose.

12/ See Army Regulation MD.40-41, 18 April 1972; Air Force Manual 35-10, 1 December 1972; Marine Corps Order 6310.1, 9 July 1975; Air Force Pamphlet 160-44, 22 August 1977.

Prior to the development of such regulations, a service man with PFB was often administratively discharged with a less than fully honorable discharge, harrassed, often became the victim of racial insults, suffered administrative discipline and courts martial. With the increased awareness of PFB and the fact that it is caused by curved hair follicles and curly facial hair, and not poor shaving practices, there is a more enlightened attitude on PFB in the military. This is not to say that the Black PFB victim in the military is now free from all stigmas, but present military policies and practices are more sensitive to PFB than Safeway.

It almost goes without saying that decisions of the Supreme Court, in addition to establishing the law of the

land, set social policies.[13/] Presently, there is no law, other than the 4th Circuit's decision, on the issue of PFB. If the lower courts' decisions are allowed to stand unchallenged, then employers and others can reasonably believe that discrimination against PFB sufferers is permissible.

In most instances people wear beards because of their personal preference. As result thereof, they may be forced to choose between a number of things society has to offer and their beard. Presently, there is no constitutional or statutory right protecting a person who voluntarily grows a beard to be free from demands by employers and

13/ Such was the case in Dred Scott v. Sanford, 19 How. 393 (1857), Plessy v. Furgeson and Brown v. Board of Education, 347 U.S. 483 (1954)

others regarding their beards. However, NBVO asserts that PFB sufferers should and do have statutory rights not to be put in the position of choosing between their health or economic well being.

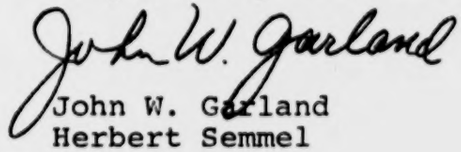
Congress, in its deliberations over Title VII was acutely aware of the dismal national employment records of Blacks. It would indeed be against the purpose of the statute to permit discrimination against those Black men with PFB who must wear beards. It is the disproportionate predisposition of Blacks to PFB that gives rise to the grave social implications of this case.

CONCLUSION

Amicus file this brief to urge the Court to grant Certiorari and reverse the judgment of the Court of Appeals

and District Court below with instructions to the District Court to enter judgment for the petitioner.

Respectfully submitted,



John W. Garland
Herbert Semmel

CENTER FOR LAW AND
SOCIAL POLICY
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

ATTORNEYS FOR PETITIONER

Garrett L. Wong*

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* A third year student at the University of Pennsylvania Law School.